

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**











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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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MICHAEL MEEROPOL and ROBERT MEEROPOL,	:	
Plaintiffs-Appellants,	:	
-against-	:	Docket No. 76-7434
LOUIS NIZER, DOUBLEDAY & COMPANY, INC.	:	
and FAWCETT PUBLICATIONS, INC.,	:	
Defendants-Appellees.	:	

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BRIEF FOR APPELLANTS

Statement of the Case

This is an appeal from a final judgment entered in the district court on July 23, 1976 (684)\* dismissing all counts of the complaint and supplemental complaint against all of the defendants.

The judgment of dismissal is based upon the decision and order of the United States District Court for the Southern District of New York (Tyler, J.) dated July 31, 1974 granting partial summary judgment to the defendants Nizer and Doubleday, dismissing Count II of the complaint, 361 F. Supp. 29 (S.D.N.Y.

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\* The pages of the Appendix are paginated by the letter "A" followed by the page number. All page references in the brief to the Appendix will be in parentheses but omit the letter "A".

1974) (181-204), and from a further decision and order of the district court (Gagliardi, J.) dated July 20, 1976 (S.D.N.Y. 1976) (650-683) granting summary judgment against plaintiffs on Counts I and III of the complaint and supplemental complaint and Count II of the supplemental complaint.

### The Proceedings

In June 1973 plaintiffs Robert and Michael Meeropol, a/k/a Robert and Michael Rosenberg, children of Ethel and Julius Rosenberg, residents of Massachusetts, brought an action in the Southern District of New York against Louis Nizer, the author of The Implosion Conspiracy (hereinafter the "book") and Doubleday & Company, Inc., its publisher, for

(1) statutory copyright infringement pursuant to 17 U.S.C. §101 of letters contained in the copyrighted book Death House Letters of Ethel and Julius Rosenberg (hereinafter "Death House Letters") (Count I) and

(2) defamation and invasion of plaintiffs' privacy through the publication of The Implosion Conspiracy (Count II) and

(3) common law infringement of and injury to plaintiffs' property rights as the common law copyright owners of the unpublished works of their parents (Count III) (1-17).

Plaintiffs moved for a preliminary injunction against further printing and distribution of the book. The defendants cross-moved to dismiss the statutory copyright claim, on the ground that the infringement was privileged on the claim of "fair use." In an opinion dated July 18, 1973, Judge Tyler



denied the motion for preliminary injunction and the cross-motion to dismiss. Meeropol v. Nizer, 361 F. Supp. 1063 (S.D.N.Y. 1973) (95-113)\*.

On January 30, 1974, Nizer and Doubleday moved for a partial summary judgment dismissing Count II of the complaint. The motion was granted July 31, 1974.

On March 6, 1974, plaintiffs commenced in the Connecticut federal district court a similar action against Fawcett Publications, Inc., which was preparing to distribute the book in paperback. On March 19, Fawcett moved to stay the Connecticut action and to intervene in the New York action. These motions were granted with an unreported opinion on April 3, 1974, with leave to plaintiffs to file a supplemental complaint. Plaintiffs appealed. This Court affirmed on October 12, 1974, 505 F.2d 232, but held that plaintiffs' right to a jury trial against Fawcett in the Connecticut action would be preserved in the consolidated action in New York.

On April 11, 1974, Fawcett answered to the original complaint in the New York action (45-49). Plaintiffs then filed a demand for trial by jury (50-51). On June 28, 1974, the lower court ruled that plaintiffs had waived their right to a jury as

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\* In the opinion Judge Tyler stated:

" ... 'fair use' would seem to be a function of all of the circumstances, and plaintiffs should have an opportunity to rebut the presumption that arises from the nature of the materials and the circumstances described herein." 361 F. Supp. at 1070.

to Nizer and Doubleday and Fawcett in the original action. Plaintiffs' supplemental complaint was filed January 15, 1975 (55-84). Plaintiffs made demand for trial by jury (85) and Fawcett filed its answer (86-94).

On January 30, 1975, all the defendants moved to dismiss the remaining counts of the complaint. This was granted by opinion and order of July 20, 1976.

#### The Pleadings

The first count of the complaint is brought under 17 U.S.C. §101 by plaintiffs as owners of certain copyrighted letters written by their parents, Ethel and Julius Rosenberg, which were published in 1953 under copyright in a book entitled Death House Letters of Ethel and Julius Rosenberg. These letters were bequeathed to the plaintiffs by their parents. The defendants infringed upon and unlawfully appropriated plaintiffs' copyright by printing and including in the book, without plaintiff's permission, 28 of the copyrighted letters and substantial excerpts therefrom. Plaintiffs alleged that the infringing work is an inaccurate, distorted and fictitious version of what had transpired in the Rosenberg-Sobell case and of the plaintiffs in their relationship with their parents; and that the letters were incorporated in the book as a means of promoting and selling the book. (1-8, 55-68)

The second count alleges that the plaintiffs, private



persons, were defamed and their privacy invaded by the book which contained false, fictitious and distorted writings about them individually and in their relationship with their parents; and that the book set forth false and fictitious events and conversations involving the plaintiffs with their parents and others and purports to describe the most personal and intimate aspects of the plaintiffs' lives. The false and fictitious writings complained of were published by the defendants with full knowledge of the falsity of the writings and in reckless disregard of the truth, and with malicious intent and in wanton and reckless disregard of the rights of plaintiffs. (8-12, 68-75)

The third count of the complaint alleges that the plaintiffs are the common law copyright owners of their parents' unpublished letters and that the writings and infringements complained of caused damages to the plaintiffs' literary property. (12-13, 75-76)

The answers of all the defendants were essentially identical. They acknowledge the infringement but maintain that it was privileged under the doctrine of fair use.\* In response

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\* The defendants' answer also claimed that the plaintiffs lack standing to sue and that the defendants had obtained the consent to use the copyrighted materials; and that some of the writings were in the public domain and the copyright had been lost or abandoned. None of these defenses was seriously asserted after the disposition of the motion for a temporary injunction and the order and judgment dismissing this count of the complaint rested solely upon the ground of fair use.

to the second count, the defendants made general denials; maintained that the subject matter of the book was of historical significance and hence the writings were privileged under the first and fourteenth amendments of the Constitution; and that the defendants believed all of the challenged writings encompassed by Count II of the complaint were true. (30-50, 86-94)

#### Questions Presented

1. Did the district court err in finding that defendants' infringement of the copyrighted work was entitled to the fair use defense even though:

(a) the infringing work may have been entirely inaccurate and lacked any independent research;

(b) the copyrighted work consisted of letters of the highest literary quality which were the "unique intellectual product" of their authors;

(c) the infringing work appropriated approximately 2000 words of the copyrighted work verbatim, in direct violation of the custom and practice of the publishing business which requires permission for any verbatim use in excess of 300 words;

(d) the letters were appropriated not for any "historical facts" contained within them, but because they were "love letters" and because of the "eloquence" and "passion" of their expression and to sensationalize their otherwise inaccurate, fictionalized book; and

(e) the publication of the copyrighted letters in the infringing work substantially diminished the value of and market for the copyrighted work



by directly competing with plaintiffs' rightful use of the letters?

2. Did the district court on a motion for summary judgment prior to the completion of discovery exceed its powers and deny plaintiffs due process in making numerous findings of fact on clearly disputed factual issues such as the nature and purpose of the infringing use, the value of the infringing work, the qualitative and quantitative importance of the infringing use, and the nature of the copyrighted work itself?

3. Did the district court, in determining fair use, err as a matter of law in holding irrelevant:

(a) that the infringing work is grossly inaccurate and completely devoid of historical research;

(b) the infringing use is far in excess of that permitted by the custom of the trade;

(c) the infringing work diminished the value of or market for the copyrighted work?

4. Did the district court exceed its power and abuse its discretion in precluding any discovery on the counts of the complaint charging defamation and invasion of privacy, granting summary judgment, and holding, as a matter of law, that:

(a) the plaintiffs were voluntary public figures because they were the children of "famous parents";

(b) plaintiffs were required to establish "actual malice" on the part of the defendants;

(c) the plaintiffs were precluded from engaging

in discovery in that such discovery would have a "chilling effect";

(d) the plaintiffs were precluded from recovering under the New York privacy statute since the defendants identified the plaintiffs by their birth names rather than their adoptive names, even though plaintiffs were known by both names;

(e) the plaintiffs were precluded under the New York privacy statute in that the writings were fictionalized versions of "historical events";

(f) the portions of the writing publicizing the most intimate and personal relationships within a family, whether true or false, and the fictionalized writings of intimate and personal affairs, are privileged under the first amendment; and

(g) the plaintiffs could not recover for invasion of privacy under New York law and could not recover under the law of Massachusetts, their residence, or the law of Connecticut, the residence of Fawcett?

5. Did the district court err and exceed its powers, in the absence of discovery, in finding as a fact that the book accurately portrayed the plaintiffs and their family; that there was an absence of evidence of malice; that the book was a product of research and care and there could be no serious doubt concerning the truth of the statements therein?



### Statement of Facts

Plaintiffs at the time of their parents' arrests in 1950 were seven and three years of age, at the time of execution ten and six years of age. During these most difficult years, the custodians and guardians took whatever steps were possible to immunize the children from involvement in the case and from public notoriety while at the same time assuring a continued relationship by letters and by visits with their parents. Other than in the period immediately preceding their parents' execution, and then to a very limited extent, the plaintiffs were protected from the press and public. (153-156)

After the execution of the Rosenbergs in June of 1953, and at about the time of the death of their closest adult, Emanuel Bloch, in January of 1954, the plaintiffs were placed in the care of Abel and Ann Meeropol, their prospective adoptive parents, who from that time onward assiduously kept the plaintiffs protected from any kind of publicity and to this end the plaintiffs assumed the adoptive name Meeropol. The plaintiffs thus lived free from any publicity, notoriety or personal intrusion until the publication of the defendants' book.

The assault on the plaintiffs in the defendants' book, the defamation of the plaintiffs, and the false and fictitious

portrayal and description of the most personal and intimate aspects of plaintiffs' lives, compelled plaintiffs to respond to the lies and distortions and protect their statutory copyright. Accordingly, plaintiffs commenced the instant action.

### The Letters

During the period of the Rosenbergs' incarceration they wrote letters to each other, the plaintiffs and their attorney which were published under copyright in June of 1953 for the specific benefit of the plaintiffs, the proceeds to be used to support the plaintiffs during their minorities. To this end a trust fund was established which was terminated when the younger child, Robert, reached his majority, at which time the copyrighted property and the remaining assets were turned over to the children.

During the years 1953 to 1956, the Death House Letters were published in numerous countries throughout the world. Their sale numbered in the hundreds of thousands. They were appreciated and esteemed not only for the content and emotional quality but for their high literary value as well.

The plaintiffs at all times here at issue had physical possession of their parents' original letters published and unpublished. This was their heritage from their parents which they desired to preserve with the specific intent at



such time as they deemed appropriate to publish them.\*

### The Infringing Work

In the summer of 1971, Nizer was approached by Otto Preminger, a producer and director, and asked to write a dramatic script about the Rosenberg case. Nizer at that time acknowledged his acquaintance with the case as remote, a "controversial abstraction." He commenced writing the script in the late summer of 1971 and had completed it in January of 1972. (259-261)\*\*

As testified to by Preminger in his deposition, some of the material on which Nizer based his dramatic script was derived from the trial record; The Judgment of Julius and Ethel Rosenberg by John Wexley, published in 1955; The Betrayers by Jonathan Root, published in 1963; The Rosenberg Story by Virginia Gardner, published in 1954; The Book of Daniel by Edgar L. Doctorow, a work of fiction published in 1971. Some, if not all, of these works were given to Nizer by Preminger. Nizer

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\* In May of 1975, the plaintiffs did publish a book entitled We Are Your Sons which contains previously published and copyrighted letters of the Rosenbergs as well as letters not theretofore published. (We Are Your Sons, The Legacy of Ethel and Julius Rosenberg, written by their children, Robert and Michael Meeropol, published by Houghton Mifflin Company).

\*\* That script was reworked by three professional script writers employed by Preminger in 1972 with the intent of utilizing the script for television or movie production later that year. That project came to naught. (260)

consulted with Preminger in the writing of the dramatic script and as acknowledged by Preminger portions of the script were fictional. (259-261, 270-272)

In February 1972, Nizer submitted the script to Doubleday and negotiated a contract to write a book on the Rosenberg case using the dramatic manuscript as the basis therefor.\* He commenced writing the book in or about early March 1972 and completed it by August 1972, the manuscript being in galley by September 1972. (259-261)

In May of 1972, after meeting with Gloria Agrin (co-counsel with Emanuel H. Bloch on the appeals in the Rosenberg case), Nizer was told that the Death House Letters were published under copyright in the United States and in various other countries. Some short time thereafter, Preminger sent Nizer the British copyrighted edition of Death House Letters. The receipt of these letters occurred at the time that Nizer was writing the last quarter of his book and it is in this last section of the book that Nizer had inserted in part or in whole 28 of the plaintiffs' copyrighted letters. (269-270).

In the opening portions of the book, Nizer represented to the reader that it was written based upon his personal

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\* While the initial Nizer dramatic manuscript was completed in January of 1972, substantial portions of that manuscript were incorporated verbatim into the final published edition of The Implosion Conspiracy. (268)



investigation of the principals in the Rosenberg-Sobell trial as well; that "there was no place for fiction or imaginative reconstruction" in the book, "authenticity being the key." Nizer stated that the book met the standards required of a lawyer writing "a critique for a law review" and of "a reporter on a Pulitzer Prize mission." (N. 2, 4)\*

Approximately 70% of Nizer's book relates to Nizer's version of the Rosenberg trial and post-trial legal proceedings. The defendant purports to set forth verbatim extracts of the trial record as well as conversations between the Rosenbergs and their trial counsel during that period of time. The purported trial record as set forth in the book on almost every occasion contained numerous errors and misstatements and distortions, and failed to note where there are elisions or alterations which changed the meanings of the portions quoted. Portions of the trial transcript are inaccurately converted into dialogue and held out to the reader as verbatim reportage. The alleged private conversations between the Rosenbergs and their attorneys and others are false and fictionalized. (273-275 and exhibits attached to Perlin and Wexley affidavits, 286-426, 427-446, 448-506, 9(g) statement 583-590; supplementary affidavit, 591-606; see also 152-168, 169-180).

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\* "N" refers to the pages of The Implosion Conspiracy in its hard cover edition.

No attempts were made to obtain the actual facts from any of the persons having knowledge of or associated with the case, i.e., judges, the prosecutors, the co-defendant Morton Sobell, the jurors, the witnesses or the government agents involved in the investigation and prosecution of the case.\* The infringing book has no footnotes, no record reference, no index, or bibliography or any notation from which a reader could verify anything set forth in the book.

Major portions of the book, including those relating to the trial and legal proceedings, are either copied verbatim, paraphrased or excerpted, many in a false and distorted fashion from secondary or tertiary sources (primarily from The Judgment of Ethel and Julius Rosenberg, as well as substantial portions from The Betrayers and The Rosenberg Story). (Exhibit 4 to Perlin affidavit of April 23, 1975 (334-336)).\*\*

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\* But, for example, see the persons interviewed and the areas of investigation engaged in by Alvin H. Goldstein, as set forth in Exhibit 17 to the Perlin affidavit of April 23, 1975 (404-409). Mr. Goldstein was the producer of the well known documentary film on the case entitled The Unquiet Death of Julius and Ethel Rosenberg. See also the affidavit of Walter and Miriam Schneir, Exhibit 18 attached to the Perlin affidavit of April 23, 1975 (410-416).

\*\* Nizer acknowledged deriving "facts" and information from Doctorow's book, Book of Daniel, but, as Doctorow states in his affidavit, his book is a novel and never held out as a work of non-fiction and hence could hardly qualify as a documentary source of information (422).



In the last 125 pages of the book one finds all of the copyrighted letters interlaced with false and fictitious descriptions of dialogues and events involving the plaintiffs and their parents. The letters incorporated in the book play a prominent part in the promotion and sale of the book and were used to give an aura of authenticity to this plagiarized, fictionalized and false history of the plaintiffs and their parents. The dust jacket of the book, for example, states:

"The emotional content of the story is at times almost overwhelming: the love story of Ethel and Julius that endured through waves of hope and despair, and expressed in love letters between them while in the Death House;" (Exhibit E to the complaint)

In the ads placed in the media, the letters once again were featured prominently in the context of such phrases as "Enormous drama .. the extraordinary passion of their letters to each other; the awful plight of their children; ... " In the advertising material (drafted by Nizer) we find the following:

"The Implosion Conspiracy is an extraordinary love story .. for two years they lived in the Death House at Sing Sing separated by only 30 feet and unable to touch each other. They expressed their longing by writing love letters. I quote generously from them in the book. Their eloquence, pain, devotion and lyrical passion would be worthy of a great poet.

"I will not quote more of their letters here. The book does." (256)

In a speech at a gathering in Washington, D.C. in June of 1972, Nizer, in promoting the sale of his book, stated:

"The love letters she wrote were published while she was in jail. They were moving documents. Somehow or other people who face death become very eloquent. Sacco, Vanzetti and others, even when they were illiterate, and Ethel Rosenberg was by no means illiterate .. she was a cultured lady and so her letters were extremely moving." (255)

The infringement and misuse of the copyrighted letters in the defendants' book must also be considered along with those portions of the book which falsely and fictitiously portray plaintiffs and attribute to them statements and conduct individually and in their relationships with their parents. It is in the last quarter of the book that we find most of these false and fictitious descriptions and attributions. Save for the false and fictitious writings, this portion of the book is almost entirely derived from the books by Wexley, Gardner and Root, sometimes by paraphrase, on other occasions by verbatim copying.\*

The defendants, on the basis of the false writings, seek to portray the plaintiffs as alienated from their parents both as children and in their adulthood. The personal and intimate meetings between the plaintiffs and their parents in the death house are misdescribed, dialogue is invented, and the book purports to describe the most intimate and personal feelings and conduct of the plaintiffs during these private, tragic

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\* In this portion of the book dialogue is set out as verbatim conversations between the plaintiffs, the Rosenbergs and others, or as true excerpts from the trial transcript. Numerous examples of the fictitious writings as well as false representations of the contents of the trial transcript are set forth in plaintiffs' affidavits opposing the two motions for summary judgment.



moments.

In the plaintiffs' answers and supplementary answers to the interrogatories of the defendants, and the exhibits attached thereto, and in the affidavit of March 1, 1974 (152-157), as well as in the response to the lower court's request for a Rule 9(g) statement (1969-180), the specific portions of the book complained of are identified separately and in the context of the entire defamatory work. The papers in opposition to the motion for summary judgment to dismiss the copyright count of the complaint also set forth examples of writings which are defamatory, constitute an invasion of privacy, and are false and fictitious.

An example of malicious fictionalization by the defendants can be found on page 532 of The Implosion Conspiracy, wherein Nizer wrote:

"On the evening of the execution, the kind woman with whom the children were staying sought to shield Michael from the shock. There was a baseball game between the New York Yankees and Detroit Tigers on television. She lured him into watching it. She had underestimated the overriding interest in the case. Suddenly, there was a fearful scream like those that ejected him from his nightmares. A bulletin had flashed across the screen: 'President Eisenhower has turned down Ethel and Julius' final appeal. They must die tonight.'

"She rushed into the room and found Michael curled up in a corner of the big leather chair in a fetal position, whimpering. With difficulty she lifted him in her arms and carried him to bed, where she held him tenderly during the sleepless night."

In their answer to interrogatories and further interrogatories, the plaintiff Michael wrote:

"The description of plaintiffs' behavior is untrue. On the day of plaintiff's parent's executions, plaintiff returned to the place that he was staying after being with children in the neighborhood at about 8:00 P.M. and was told of the executions. Plaintiff sat quietly with his hands folded looking down. Plaintiff did not cry." (Answers to Amended Interrogatories, January 17, 1974).

Other similar passages which defamed plaintiffs and held them out in a false light were cited. For example, Nizer wrote, concerning his "claim" that the Rosenbergs "sacrificed" their children,

"The committee pressed for an all-out appeal before the final appeals went to the Supreme Court. It wanted to muster Michael and Robby into the ranks. The Blochs, of course, were opposed to that. Manny had adopted the role of child psychologist in protecting the children as much as possible from the trauma of their parents' plight.

"However, the Rosenbergs were carried away by what they thought was the winning battle and felt every contribution should be made. Perhaps they even reasoned that if the public relations battle was won, the children would be saved too. Without doubting their love for their children, their decision nevertheless was to assign them actively to the committee's activities. So the children were cast into the limelight at public meetings, as sympathetic exhibits for the denunciation of the death sentence. There they sat while speakers pointed at them and harangued audiences that they must not become orphans. Repeatedly, they heard the gruesome references to death in the electric chair, and the short time remaining before their father and mother would die in it. They were even exploited as pickets, carrying signs which read "Don't kill my mommy and daddy." Undoubtedly, they brought tears and contributions from the audiences, but Alexander Bloch, particularly was disgusted with the ruthlessness of the campaign. Emanuel also disapproved, but he could not distinguish emotionally between Ethel and Julius' struggle and their children's 'duty' to co-operate." The Implosion Conspiracy, pp. 422-423.



The First Motion for Partial Summary Judgment Directed to Count II of the Complaint

Plaintiffs noticed the taking of depositions of the defendants for September 1973. Defendants in September 1974 successfully moved to stay all depositions until plaintiffs answered defendants' voluminous interrogatories. Plaintiffs filed answers and supplementary answers to the interrogatories and renoticed the defendants' depositions which did not commence until January 29, 1974. Defendants refused to answer any question which would relate in any way to Count II. A conference was held on January 30, 1974 in chambers, at which time the motion for summary judgment to dismiss Count II was served, whereupon the court stayed any discovery relating to that count (114-151).

The plaintiffs formally moved to adjourn the summary judgment motion and for leave to engage in discovery on the second count. Plaintiffs, by affidavit of March 1, 1974, set forth in meticulous detail the need for and the area of discovery. (152-168) Argument was had on plaintiffs' application. Decision on the application was reserved by the court. Thereafter, the lower court, in April 1974, requested, still deferring its ruling on plaintiffs' application, that plaintiffs submit a Rule 9(g) statement without prejudice to the pending application. On April 10, 1974, plaintiffs submitted a response to the court's request, noting that:

"All of the documents heretofore submitted by plaintiffs in the form of affidavit, memorandum and letter since the service of the motion and at the return thereof have been in support of plaintiffs' application to defer the disposition of the motion for summary judgment until the requested discovery has been made so that plaintiffs may submit affidavits and exhibits in opposition thereto. Hence the plaintiffs have not yet submitted any affidavits in opposition to the motion and any such papers, if submitted now, would be partial if not fragmentary in light of the restrictions imposed on plaintiffs' discovery."  
(170)

The district court never ruled upon or advised the plaintiffs of its determination on the application for adjournment and discovery. Without affording plaintiffs leave to file any affidavits in opposition to the motion for summary judgment, it rendered an opinion and order granting Nizer's and Doubleday's motion for partial summary judgment dismissing Count II on July 31, 1974.

Plaintiffs moved in the district court for an order pursuant to Rule 54(b) or, in the alternative, certification pursuant to 28 U.S.C. §1292(b). Argument was held on October 11, 1974. The court there acknowledged the substantiality of the issues raised and stated:

"... you see, your basic argument here has a certain amount of appeal. I mean, I did say that count 2 was out of the complaint, and I was trying to construe Gertz, the latest expression from the Supreme Court, which commentators already were having trouble with, et cetera, et cetera, et cetera."

"I understand you, and it is a situation where I suppose reasonable men can differ, to use that ancient formula ... ." (Transcript of argument of October 11, 1974, p. 14).



The court explained its refusal to permit discovery, stating:

"Well, to an extent, and also most importantly, I refer to the book, which doesn't need to be discovered. It is there." (Transcript of argument of October 11, 1974, p. 20)

The motion was denied on October 29, 1974. On December 4, 1974, plaintiffs filed a petition for a writ of mandamus in this Court to compel Judge Tyler to grant relief under Rule 54(b) or 1292(b). After argument the petition was denied in January 1975.

The Defendants' Motion for Summary  
Judgment Directed to Counts I and III

The plaintiffs' depositions of the defendants with respect to Counts I and III were held in abeyance by the court pending the appeal from the order of April 3, 1974 until the latter part of October 1974. Plaintiffs renoticed the defendants' depositions after delays. A short examination of Doubleday (Kenneth McCormick) was held on December 31, 1974. It was adjourned, and the witness never appeared at an adjourned date after the second motion for summary judgment on January 31, 1975. was filed. McCormick's examination was far from complete.\*

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\* The depositions of Mr. McCormick were held on February 21, 1974 (pages 1-137) and December 31, 1974 (pages 138-203). Plaintiffs sought to elicit the fact that Doubleday meticulously investigated to determine the truth and accuracy of all of the statements in the book Invitation to An Inquest. That book contained excerpts of Rosenberg letters which were included only after Doubleday obtained the written consent of the copyright owners.

After repeated adjournments, Nizer finally appeared for the continuation of his deposition on January 31, 1975. The motion for summary judgment was served at the opening of the deposition. The deposition was far from complete, but the defendants refused to appear at any adjourned time in the light of the second motion for summary judgment.\*

Plaintiffs moved for an order adjourning the motion for summary judgment so as to permit plaintiffs to proceed with and complete the discovery which had been either frustrated or held in abeyance since the institution of the action. (238-249). A short adjournment was granted during which time plaintiffs were only permitted to depose one nonparty witness, Otto Preminger.\*\*

Judge Gagliardi held the matter under consideration for almost a year and then set the matter down for argument on March

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\* The record of the depositions of Nizer which were limited to the first Count of the complaint only is as follows: January 29, 1974 (pp. 1-94); February 13, 1974 (pp. 95-198); March 19, 1974 (pp. 199-287); January 31, 1975 (pp. 199-287).

\*\* While the motion for summary judgment was pending, Judge Tyler resigned and the case was reassigned to Judge Pollack. On April 3, 1975 argument was had before Judge Pollack, who denied defendant's summary judgment without prejudice and set a schedule for the completion of discovery by all of the parties in anticipation of an early trial date. The defendants moved for reargument, but the case was reassigned to Judge Gagliardi.



26, 1976. His opinion and order granting the defendants' motion in all respects was filed on July 20, 1976; final judgment was filed on July 23, 1976 and plaintiffs appeal thereafter duly filed.

Opinion of Tyler, J. Dismissing Count II

The court held that because First Amendment rights were involved, even absent any discovery, summary judgment was particularly appropriate in this case to avoid a "chilling effect" which could arise out of this litigation. The court found that the plaintiffs are public figures and as children of the Rosenbergs had achieved "general fame or notoriety". Thus, plaintiffs were required to prove "actual malice" and there was no evidence from which a showing could be made and hence summary judgment must be granted. Finally, the court concluded that The Implosion Conspiracy is a "scholarly study built upon exhaustive research" and contains nothing "repugnant to one's sense of decency". Hence no action in defamation could lie.

Since the challenged writings are properly "within the orbit of public interest and scrutiny", they are constitutionally protected regardless of their truth or accuracy unless they are fictionalized. The court "found" that The Implosion Conspiracy was not fictionalized. The plaintiffs are not identified as "Meeropol" in the book and hence they may not recover under the New York Civil Rights Law and that there is no common law right to privacy in New York. The court did not direct itself to the question of whether an action for invasion of privacy under the

laws of Connecticut or Massachusetts or available to the plaintiffs to sustain their cause of action.

Opinion of Gagliardi, J. Dismissing Counts  
I and III

The lower court held that The Implosion Conspiracy would "provide reasonably valuable source material for future historians, biographers and social scientists". Even were the work to be found grossly inaccurate, distorted and lacking in the minimum indicia of serious scholarly research and of historical value, fair use may still be invoked as long as there is "some serious attempt to describe a historical event". That is an issue that the court alone can decide merely from reading the papers submitted on the motion and the book at issue. One must consider that the book is a "purportedly serious work by one with Nizer's reputation and experience as a trial lawyer".

The fact that the value of plaintiffs' copyright might be diminished is insufficient to defeat a fair use defense. The question of the amount of copying as a qualitative factor is a subjective one about which reasonable men may disagree but the court may make that factual determination. The custom of the publishing industry with regard to verbatim copying is irrelevant and any expert testimony is unnecessary and would not be permitted by the court.

The Rosenberg letters are "historical facts" and hence



verbatim copying was both necessary and justified to obtain the privilege of fair use. Notwithstanding the admitted quality of the copyrighted writings, the exploitation of these writings by the defendants did not constitute a capitalization "on the unique intellectual product of the author".

While acknowledging that the infringement was "more than insignificant" and may have done "some" injury to the copyrighted works, the court finds that the injury suffered is not sufficiently substantial to deprive the defendants of the fair use defense.

While the qualitative impact of the taking depends upon an independent subjective judgment, the lower court believes that the factors are so overwhelmingly in one direction that the issue need not be submitted to the trier of facts with or without a jury and no reasonable jury could find against the defendants.

POINT I

THE DISTRICT COURT ERRED IN GRANTING SUMMARY  
JUDGMENT AGAINST PLAINTIFFS ON THEIR CLAIM OF  
COPYRIGHT INFRINGEMENT ON THE GROUNDS OF FAIR USE

The plaintiffs pleaded that defendants infringed both  
1  
their statutory copyrights by their publication of some 28 letters  
written by Julius and Ethel Rosenberg during their imprisonment  
and prior to their execution.

The defendants initially answered these allegations by  
arguing a) that the letters were out of copyright, b) that the  
plaintiffs were not the owners of the copyrights and thus could  
not sue, c) that they had obtained permission for use of the  
letters and, finally d) that their infringement of the copyright  
work was privileged under the doctrine of "fair use." (33, 34, 43)

During the limited discovery proceedings, the first  
three defenses essentially disappeared from the case, and only  
the question of fair use remained.

After resisting virtually all of plaintiffs' attempts at  
discovery the defendants moved for summary judgment on the same  
grounds argued on the preliminary injunction motion and on "the

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1 The statutory copyright claim, pertaining to the letters  
printed in The Death House Letters forms Count I of the complaint.  
The common law copyright claim, pertaining to previously unpublished  
letters, is contained in Count III.



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expanded record" on the grounds that, inter alia, The Implosion Conspiracy was a scholarly study built on exhaustive research, which resulted in a "product of considerable research and care, and which would provide valuable source materials for future historians, biographers and social scientists."

3

After the filing of extensive papers and memoranda, and after oral argument and a further affidavit by plaintiff's counsel, the district court issued a 31 page opinion holding

"as a matter of law, the use of the copyrighted material under the circumstances here is covered by the fair use doctrine; and thus summary judgment is appropriate as to all defendants." (679)

The plaintiffs believe that the district court's holding on Counts I and III is incorrect as a matter of law, riddled with incorrect determinations of both fact and law, and is a totally inappropriate, unprecedented and erroneous application of judicial power under Rule 56, Fed. R. Civ. Proc. These three errors are

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2 The "expanded record" consisted of records of Jero Publishing Co. showing the income from sales of Death House Letters since 1956, and material submitted by defendants purporting to show that "letters stand on the same footing as other "historical facts" and thus are not susceptible to fair use." (220-229)

3 For example, plaintiffs submitted a 34 page affidavit (250-285) with twenty-one additional affidavits by others attached as Exhibits (286-426). All this and other material as well as the Rule 9(g) statement went to issues of fact which could only be resolved at trial. (427-506, 583-590)

each, in some senses, hopelessly intermingled in the district court opinion. Further, of course, in an appeal such as this, questions of substantive law and the standards for summary judgment mix inexorably with the facts contained in the record below.

In order to consider these separate but related issues as they bear on the ultimate question of whether summary judgment was properly granted, plaintiffs will briefly discuss the legal and factual standards to be applied in granting summary judgment, and the law of fair use. The district court's opinion and the record below will then be compared in light of the various criteria which determine the availability of the fair use defense.

This analysis will show that what the district court actually did was to sit as a trial court, accepting some facts as true, rejecting others as false, and incorrectly dismissing still yet others because of an erroneous interpretation of the law. Such a posture is, on a motion for summary judgment, entirely erroneous, and the district court's resulting opinion and order must be reversed.

A. The Law of Summary Judgment

In opposing summary judgment below plaintiffs pointed out that there were virtually no fair use cases in which summary judgment had been granted, excepting only those where there were stipulated facts or joint motions. Additionally, plaintiffs relied in part on this Court's decision in Arnstein v. Porter,



154 F.2d 464 (2d Cir. 1956), a copyright infringement case.

Although Judge Frank deemed the plaintiff's story of the alleged infringement there "fantastic," the judge reversed the grant of summary judgment, holding, inter alia, that the

"[p]laintiff must not be deprived of the invaluable privilege of cross-examining the defendant--the 'crucial test of credibility'..." Arnstein, Id. at p. 469 (footnote omitted).

The importance of calling and cross-examining the defendant at trial was stressed notwithstanding the fact that the defendant had already been examined in depositions. The

4 The defendant there submitted, inter alia extensive depositions taken by both parties; he also categorically denied access to plaintiff's compositions. In the instant case, of course, discovery was far from complete both when the motion for summary judgment was made and when it was decided.

5 The Court wrote,

"...the right to use depositions for discovery or for limited purposes at a trial, of course, does not mean that they are to supplant the right to call and examine the adverse party, if they are available, before the jury....As we have said, 'a deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand' for it deprives 'of the advantage of having the witnesses before the jury.'" Id. at p. 470 (footnote omitted).

The rationale of this holding should and is not limited to jury trials, although, of course, plaintiffs are entitled to such a trial against Fawcett. Determination of credibility is equally important to a trial judge and plaintiffs should have an equal opportunity to test the credibility of the defendants before Judge Gagliardi.

importance of credibility in denying motions for summary judgment is, of course, still good law where motivation or intent are at issue. See, e.g. Sterling National Bank and Trust Co. of N.Y. v. Fidelity Mortgage Investors, 510 F.2d 870, 875 (2d Cir. 1975) (and cases cited therein), Conrad v. Delta Airlines, Inc., 494 F.2d 914 (7th Cir. 1974).

The district court below ignored the holding of Arnstein, apparently finding that its scope had been limited by subsequent<sup>6</sup> decisions of this Circuit. The district court went on, somewhat inexplicably, to cite some nine decisions of this Court which were issued "in the period since [the motion for summary judgment] was submitted." (660)

In those decisions which he described as "...outlining the standards to be applied in motions for summary judgment...."<sup>7</sup> (Id.) this Court emphatically reversed lower court grants of summary

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<sup>6</sup> Judge Gagliardi cites Heyman v. Commerce & Industry Insurance Co., 524 F.2d 1317 (2d Cir. 1975) as disapproving Arnstein's alleged holding that summary judgment should not be granted "except in the most extraordinary of circumstances." Heyman, Id. at p. 1319. He does not, however, deal with the specific holding as to the necessity for cross-examination in a disputed copyright case, a holding which is both good law and controlling here.

<sup>7</sup> For example, in Heyman, supra the Court noted:

"although the basic principles for granting summary judgment are well established, the frequent recurrence of cases in which granting it is inappropriate persuades us that these underlying tenets bear repetition." Id. at p. 1318 (emphasis added).



judgment in seven of the nine cases!

The "standards to be applied" in all nine of those cases are standards with which plaintiffs heartily agree.

The most general standard is that set forth in Heyman, supra, where the Court wrote:

"The 'fundamental maxim' remains that on a motion for summary judgment the Court cannot try issues of fact; it can only determine whether there are issues to be tried." Id. at pp. 1319-20 (citations omitted).

In Zolar Publishing Co., Inc. v. Doubleday & Co., 529 F.2d 663 (2d Cir. 1975), a copyright case, the Court held that where the intent of parties to a contract is at issue, summary judgment is inappropriate. Zolar, 529 F.2d at p. 666.

In Judge v. City of Buffalo, 524 F.2d 1321 (2d Cir. 1975) this Court reversed, cautioning

"...summary judgment must be used selectively if we are to avoid trial by affidavit." Id. at p. 1322.

In U.S. v. Bosurgi, 530 F.2d 1105 (2d Cir. 1976) the district court granted summary judgment against the government because it had "failed to offer any convincing evidence that controverts [the defense pleaded]". Id. at p. 1110. In a holding directly applicable to the decision in the instant case,

8 Significantly, in each of the two cases where summary judgment was upheld, the non-moving party had a "heavy burden" to meet in establishing his case. U.S. v. Matheson, 532 F.2d 809, 818 (2d Cir. 1976), Williams v. McAllister Brothers, Inc., 534 F.2d 19 (2d Cir. 1976). Here, of course, the burden was on the defendant who was the moving party.

this Court held:

"...a party opposing a motion for summary judgment [may not] be denied a trial on the ground that the District judge does not find the opposing evidence 'convincing.'" Id. at p. 112.

And in Home Insurance Co. v. Aetna Casualty & Surety Co., 528 F.2d 1388 (2d Cir. 1976) the Court noted that the question of "understanding and custom in the industry" raises a question of "material fact" which precludes summary judgment." Id. at p. 1390.

Had the district court applied any or all the "standards" contained in the cases cited in its opinion, it would have found summary judgment entirely inappropriate. For, in the instant case, there are questions of the defendants' intent (Zolar) good faith, Jaroslawicz v. Seedman, 528 F.2d 727 (2d Cir. 1975) and the "custom of the industry" (Home Insurance). In the absence of complete or adequate discovery, the proceeding below was never more than a 'trial by affidavit' (Judge) and summary judgment was clearly granted because the judge was not "convinced" by plaintiffs evidence. (Bosurgi)

This Circuit still considers summary judgment a "drastic device" Heyman, supra at p. 1320. It has recently written:

"Summary judgment cannot be sustained merely because the judge believes that the party against whom it is entered is unlikely to prevail on the merits after a trial. To be successful on a Rule 56 application, it must be established that there are no genuine issues of material fact.



The responsibility of the district judge on a motion for summary judgment is merely to determine whether there are issues to be tried, rather than try the issues himself via affidavits. Heyman v. Commerce & Industry Insurance Co., 524 F.2d 1317 (2d Cir. 1975); see, also Judge v. City of Buffalo, 524 F.2d 1321 (2d Cir. 1975); American Manuf. Mutual Ins. Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272, 279 (2d Cir. 1967); Cali v. Eastern Airlines, Inc., 442 F.2d 65, 71 (2d Cir. 1971). Jaroslawicz, supra at p. 731. (emphasis added).

In comparing both the allegations made and facts presented with the district court's opinion on the factors to be considered in determining whether the fair use privilege applies, it is absolutely clear that the district court did precisely what Jaroslawicz prohibits -- that is, deemed itself the trier of fact and decided against the plaintiffs as if a trial had occurred.

The district court entirely exceeded its power on summary judgment, as will be demonstrated below, and its decision must, accordingly, be reversed.

B. The Law of Fair Use

The concept of "fair use" is a judge made, equitable,

9 While it would have been the trier of fact against Nizer and Doubleday, a jury would have determined the facts in the claim against Fawcett.

10 As plaintiffs have previously stated, and will demonstrate in particular instances, infra, the Court also erred on a number of legal issues which require reversal.

11 The concept of "Fair Use" which was not mentioned in the Copyright Act of 1909 has been included in the new Copyright Act, effective January 1, 1978. Copyright Revision Act of October 19, 1976 §107, Pub. Law 94-553, 90 Stat. 2541 (1976). In adopting §107,

affirmative, defense to a claim of copyright infringement. See, e.g. Nimmer, The Law of Copyright, §145 p. 643 (ed. 1974) (hereinafter "Nimmer"). Because it is an affirmative defense, the burden of proving it is always on the defendant. See, e.g., B. Ringer and P. Gitlin, Copyrights (rev. ed. 1967) 2 Nimmer at p. 145.

This Court has written:

"The fundamental justification for the privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit, "To Promote the Progress of Science and the Useful Arts." U.S. Const. art. 1, §8. See Matthews Conveyor Co. v. Palmer Bee Co., 135 F.2d 73 (6th Cir. 1943); Note, 56 Colum. L. Rev. 585, 595 (1956). To serve that purpose, "courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science, and industry. Berlin v. E. C. Publications Inc., 329 F.2d 541, 544 (2d Cir. 1964)." Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303, 306-7 (2d Cir. 1966) cert. den. 385 U.S. 1009 (1967) (hereinafter "Rosemont").

The issue of fair use is an issue of fact. E.g. Eisenschiml v. Fawcett, 246 F.2d 598, 604 (7th Cir.) cert. den. 355 U.S. 907 (1957), Holdredge v. Knight Publishing Corp., 214 F. Supp. 921 (S.D. Cal. 1963). N.Y. Tribune, Inc. v. Otis & Co.,

11 continued from preceding page

Congress essentially incorporated the entire body of judicially made law concerning fair use, eschewing any attempts to more precisely define or delimit the "quicksilver concept." See, e.g. Schulman, Fair Use and the Revision of the Copyright Act, 53 Iowa L. Rev. 832 (1968) (hereinafter "Schulman").



39 F. Supp. 67 (SDNY 1941), Nimmer, supra at p. 644.

The initial determination of whether the privilege may be claimed for particular materials turns on the nature of the materials, as this Court has stated,

"...e.g. whether their distribution would serve the public interest in the free dissemination of information and whether their preparation requires some use of prior materials dealing with the same subject matter. Consequently, the privilege has been applied to works in the fields of science, law, medicine, history and biography. See Iatman, supra at 10." Rosemont, supra at p. 307.<sup>12</sup>

After this initial determination, the applicability of the fair use defense to the particular materials in question turns on an evaluation of a number of factors. See, e.g. Time, Inc. v. Bernard Geis Associates, 293 F. Supp. 130, 145 (SDNY 1970) (hereinafter "Bernard Geis"), Marvin Worth Productions v. Superior Films Co., 319 F. Supp. 1269 (SDNY 1970) (hereinafter "Marvin Worth"), Williams and Wilkins Company v. United States, 487 F.2d 1345 (Ct. Cl. 1973) aff'd

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12 It is important to note that all this Court's Rosemont opinion actually held was that, as a matter of law, the defense of fair use was available to commercial works which, like the previously covered "scholarly works" benefited the public and promoted the "progress of art and sciences." This "initial determination" was all that was required in reversing the district court's grant of a preliminary injunction (where, of course, there was a heavy burden on the moving-party defendants). This Court did not hold that fair use was categorically applicable to commercial works any more than it was to "scholarly" works; indeed, once it found the defense available to Random House, it remanded and left to trial the factual determination of whether the privilege should apply.

MEEROPOL vs. NIZER  
Docket No. 76-7434

Errata Sheet

On page 36 of Appellant's brief, please insert, after the third paragraph, the following paragraph:

At one end, the unauthorized reproduction of facts, or compilations of facts with relatively little intellectual input by the copyrighter, is granted relatively wide latitude under the fair use privilege. See, e.g., West Publishing Co. v. Edward Thompson & Co., 169 Fed. 833 (C.C.E.D. N.Y.) modified 176 Fed. 883 (2d Cir. 1910) Webb v. Powers, 20 F. Cas. 511 (No. 17, 323) (1847).



13

by evenly divided court, 420 U.S. 376 (1975); See also  
14  
Copyright Revision Act of October 19, 1976, supra and Crossland,  
15  
The Rise and Fall of Fair Use, 20 S. Car. L. Rev. 153 (1968).

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13 In Williams v. Wilkins, the Court actually looked to eight separate and distinct criteria. In ultimately holding the fair use defense applicable to the non-commercial library photocopying involved there, the Court cautioned

"...the conclusion that defendant's particular use of plaintiff's copyrighted material has been "fair" rests upon all of the elements discussed in Part III, supra, and not upon any one, or any combination less than all. We do not have to, and do not, say that any particular component would be enough, either by itself, or together with some of the others. Conversely, we do not have to, and do not, say that all the elements we mention are essential to finding of "fair use". They all happen to be present here, and it is enough for this case to rule, as we do, that at least when all co-exist in combination a "fair use" is made out." Williams and Wilkins, id. at p. 1362.

14 The four criteria set forth in the Copyright Revision Act, effective in 1978, are

- "1) the purpose and character of the use;
- 2) the nature of the copyrighted work;
- 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- 4) the effect of the use upon the potential market for or value of the copyrighted work." Id. 8107

They are specifically intended to be non-inclusive. See Schulman, supra, Latman, Fair Use of Copyrighted Works, Study No. 14, prepared for the Subcommittee on Patents, Trademarks and Copyrights, Senate Comm. on the Judiciary, 86th Cong., 2d Sess. (Comm. Print 1960).

15 Professor Crossland reviewed all the cases and came up with nine criteria to be considered after the initial determination as to the nature of the infringing work. These were: 1) the nature of plaintiff's material and his intention; 2) the type and purposes of the use involved; 3) the quantitative extent of material used; 4) the qualitative extent of material used; 5) the intent with which the material was used; 6) the effect on the original material; 7) the amount of the user's labor involved; 8) the benefit to the user, and 9) the manner by which the copying was accomplished." Crossland, supra at p. 183.

In reviewing the facts presented and arguments advanced by both sides below, and the opinions of Judges Tyler and Gagliardi on the issue of fair use, there appear to be eight separate factors which bear upon the applicability of the fair use defense in the instant case. These are 1) the nature of the infringing work; 2) the nature of the copyrighted work; 3) the type and purpose of the use involved; 4) the quantity of the use; 5) the quality of the use; 6) the intent of the infringer in using the copyrighted work; 7) the effect of the infringement on the copyrighted work and 8) the amount of the user's labor involved and benefit derived.

We shall consider the applicable law, the facts, and the district court opinion as they bear on each of these eight factors, below, <sup>16</sup>seriatim. Such detailed analysis compels the conclusion that the district courts grant of summary judgment was erroneous both as a matter of law and because of the existence of numerous disputed factual issues which the court ignored or improperly resolved.

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16 I.e., each section from 1-8 will consist of :

- a) a discussion of the relevant law on that factor,
- b) a summary of the facts presented by both sides relevant to that factor and
- c) what the district court held or found regarding that factor.



C. Factors To Be Considered In Determining The Applicability Of The Fair Use Defense: An Analysis In Light Of The Law, The Facts, And The Opinion Below.

1) The Nature Of The Infringing Work

a) The Law

Until this Court's decision in Rosemont, there was a strong presumption that so-called "commercial" works -- those written primarily or entirely for profit -- did not "deserve" the privilege of fair use. See, e.g. Note, 56 Colum. L. Rev., supra at p. 594.

Rosemont put this prejudice to rest by holding that commercial or trade books could not be categorically denied the fair use defense. In the future, 'infringing works, whether denominated "scholarly" or "trade" would be viewed in light of whether they advanced knowledge and scholarship and/or whether they were of sufficient effort and worth to justify their making some unauthorized use of previously copyrighted material.

In analyzing an infringing work, there are essentially two questions to be asked. First, is the work itself a contribution to "knowledge" or "the development of the social sciences," and second, was its use of the copyrighted material reasonably necessary to that end.

In trying one of the first cases after Rosemont where the evaluation of a commercial infringing work was presented, Judge Levet's findings of fact reflect many of the relevant criteria to be applied. These include the amount of time spent

by the author of the infringing work on research, the sources which he employed, and the "independent creation" applied to the previously copyrighted material. Norman v. CBS, 33 F. Supp. 788 (S.D.N.Y. 1971) at pp. 790-94. All of these criteria were, of course, present in the Rosemont court's description of the infringing work there.<sup>17</sup> Rosemont's recitation of facts suggests one further and important criterion -- that of truthfulness. The Court noted that "no claim has been made that the [infringing] biography contains any misrepresentations of fact". Id. at p. 309, fn. 9. The criterion of truthfulness is critical in guaranteeing that the fair use defense be confined to areas where it is justified.

The second question, that of the necessity of use of the previously copyrighted work, was most starkly put in Bernard Geis, supra. There the material infringed was an absolutely unique piece of data without which the infringing author simply could not explain his theory of the Kennedy assassination (concededly an incident of the utmost public interest)<sup>18</sup> to the public.

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17 In Rosemont, for example, the first of two authors to work on the infringing book submitted an affidavit attesting to the extensive research he had engaged in. This included numerous personal interviews (fifteen persons interviewed were actually named) and hiring a reporter in Houston to do additional interviews. Id. at p. 306.

18 We believe that it was the uniqueness and non-translatibility of the copyrighted work which was dispositive in that case, not the public interest. In the instant case, of course, the "facts" contained in the letters could have been presented other than by verbatim reproduction, see C(2) infra.



See also, Rosemont, supra, Eisenschiml v. Fawcett, supra, Holdredge  
19  
v. Knight Publishing Corp., supra.

The first assessments for a court determining fair use are, therefore, the quality, truthfulness and worth of the infringing work, and the necessity of use of the appropriated work to its legitimate purpose.

b) The Facts

(i) Misrepresentation

The plaintiffs alleged that The Implosion Conspiracy was not a work of "criticism, historical research, or scholarship," although it was misrepresented and held out to the public--and the courts--as such by the defendants.

Nizer stated in the forward to the book:

"I was going to know as much about the Rosenbergs and the trial as was humanly possible to know, without having defended or prosecuted them.

"I was not going to write a word until research had put me under their skins, the prosecutors', the defense counsels', the Judge's, the Appellate Judges, the witnesses.'" (N.2) 20

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19 The necessity for use of a prior author's information is not, however, the same as necessity for use of the prior author's expression. In Holdredge, the court found that "Some use of the plaintiff's book as a source for an article on Mammy Pleasant as an historical personage could certainly have been termed fair...." The Court did not, however, apply fair use because the defendant's work "...mirror[ed] the manner and style in which the plaintiff sought to set down the factual and historical material she used and to express her thoughts and conclusions." Id. at p. 924.

20 "N" followed by a number denotes the page in the hard cover edition of The Implosion Conspiracy.

"Writing about a trial involves the process of reincarnation in reverse.... There is no place for fiction or even imaginative reconstruction. That is the path to a counterfeit presentation. Authenticity is the key." (N.3)

He continued:

"The Rosenberg trial...involved a succession of unexpected climaxes of which only the truth could be the author.

\* \* \* \*

"My object was to know every inch of the thousand pages of the record...judicial opinions, as if I were going to write a critique for a law review; and every book I could find for or against the verdict, as if I were going to review each one for the Sunday Times...and every person I could find who touched their lives or deaths, as if I were a reporter on a Pulitzer mission.

"Only when I had absorbed all this did I put pen to paper." (N.4) (emphasis added throughout)

As the plaintiffs demonstrated by affidavits, interrogatories and depositions, each and every one of these statements  
21  
was untrue.

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21 For example, rather than interviewing or "knowing" "every person who touched [the Rosenberg's] lives or deaths" Nizer spoke personally only with Bob Considine (an acquaintance of his who was a witness to the execution) and Gloria Agrin Josephson (in a meeting in June of 1972). He spoke by telephone to Rabbi Irving Koslowe. Nizer did not attempt to meet or interview the plaintiffs, Morton Sobell, or any or all of the other hundred or so people who are alive and who were intimately involved with the case (See affidavit of Dr. Alvin Goldstein for a list of people he interviewed in preparing a television documentary on the Rosenberg trial). (406-407)



Nizer's book was the product of a limited amount of  
secondary and tertiary material,<sup>22</sup> restated with numerous  
inaccuracies,<sup>23</sup> and sensationalized with imagined conversations,  
fictionalized<sup>24</sup> events and egregious distortions of trial  
transcript.

It was and is plaintiffs' claim that Nizer's gross  
misrepresentation of his book alone was sufficient to deny him<sup>25</sup>  
the privilege of fair use.

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22 The book rests almost exclusively on the trial record, The Judgment of Julius and Ethel Rosenberg by John Wexley, The Betrayers by Jonathan Root (drawing heavily on the Wexley book), The Rosenberg Story by Virginia Garner, and The Rosenberg Letters (here at issue), with a smattering from Was Justice Done by Malcolm Sharp, and The Book of Daniel, a novel by E. L. Doctorow. Compare this with the sources employed by, e.g. the Schneiers in preparation of their book, Invitation to an Inquest (which Nizer refused to read) (Schneir aff. 410 et. seq.) and Dr. Goldstein's affidavit, supra.

23 In their answers to the interrogatories, the plaintiffs extensively demonstrated the innumerable factual errors with which the book was riddled.

24 As Otto Preminger said about the film script from which the book was drawn:

"It is not a documentary. It is a work of fiction. So it is not a question of being completely accurate." Preminger dep. p. 224.

25 The fair use cases, particularly Rosemont, do, in fact often turn on questions of fairness and clean hands. The misrepresenting author here is no more entitled to equitable relief than was the "bogus plaintiff" in Rosemont. See especially the concurrence of Judges Lumbard and Hays, Rosemont, supra at p. 311.

(ii) Independent research employed

As the above discussion demonstrates, plaintiffs believe they have shown that Nizer did virtually no independent research, and that his book, where it is not pure fiction, is no more than a hack reworking of the books of two or three earlier writers.

(iii) Value of the book to future historians, etc.

The plaintiffs alleged that Nizer's book was totally worthless as a piece of historical writing or research, and that it would be entirely useless to anyone seeking to "build upon" the erroneous and second and third hand information contained therein.

In support of this contention they submitted numerous affidavits from respected historians and scholars who testified to the book's complete lack of scholarly or historical merit, and who decried the falsities, errors and misrepresentations it contained.

The defendants, on the other hand, categorically denied plaintiffs' allegations, repeatedly asserting that The Implosion Conspiracy was "a serious scholarly work," the "product of considerable research and careful scholarly study" and a valuable source material for future historians, biographers and social scientists.

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26 For example, Nizer's "scholarly" book contains no footnotes, no record references, no index, no bibliography, or any other notations from which a reader could verify or further pursue any piece of "information" contained in the book.

27 See, e.g. affidavits of Professors Richard Falk (355), Noam Chomsky (367), William Appleman Williams (374).



(iv) Necessity for use of the copyrighted material

Plaintiffs alleged that the verbatim use of their parents' letters was wholly unnecessary, particularly to Nizer's shoddy, error-ridden, fictionalized book. Whatever the public interest in the historical events around the trial and subsequent proceedings could have been fully satisfied by paraphrasing the letters, or otherwise using the "facts" they contained. <sup>28</sup>

The plaintiffs' allegations were supported by the affidavits of historians and experts on the period in question. (355-399).

Nizer, on the other hand contended in his affidavits, that the verbatim use of the Rosenberg letters was necessary to illustrate the historical events he portrayed. (217-218)

c) The Opinion

In the face of the decisions cited above, and the clear and unavoidable factual conflict both as to the nature of the work, and the necessity of unauthorized verbatim use, the district court held:

- 1) That the amount of the defendant's historical research or historical accuracy is not relevant to a determination of fair use. (638)

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28 Nimmer, writing on the first Tyler decision in this case strongly stated:

"The historical interest in the letters does not, in the view of this writer, justify their verbatim reproduction. See §9.24 supra." 2 Nimmer, supra, 1976 Supp. at p. 649.

- 2) That even assuming defendant's work was grossly inaccurate, he was entitled to invoke the defense of fair use. (664)
- 3) That even if defendant's work "is filled with errors and completely devoid of independant research"-- a purportedly serious work by one with Nizer's reputation -- is of some public benefit, and thus a historical work entitled to claim the protection of the fair use doctrine." (666) and
- 4) That since "the Rosenbergs' expression itself may be a relevant part of the history relating to the case...." nothing less than verbatim reproduction will suffice to meet the public interest. (672-73)

The first and second holdings are entirely erroneous as a matter of law, involve a total misreading and unwarranted and unjustified extension of this Court's Rosemont decision, and lead directly to the erroneous factual determinations made in (3) and (4).

For although the district court characterizes these latter as determinations of law, it is apparent that they are no more than erroneous and unwarranted determinations of disputed fact which are entirely impermissible on a motion for summary judgment, e.g. Heyman, supra, Jaroslawicz, supra.

The district court clearly erred as to the law, and exceeded its powers on a summary judgment motion; the decision below must be reversed.



## 2) The Nature of the Copyrighted Work

### a) The Law

It is well settled that

"While the mode of expression employed by [the author] is entitled to copyright protection, he could not acquire by copyright a monopoly on the narration of historical events." Rosemont, supra at p. 306.

This is the very heart of copyright protection, and one of the most important considerations in determining fair use.

Whether the material taken is "expression" or "event" <sup>29</sup> will almost inevitably be dispositive of the issue.

A review of the relevant case law reveals a clear spectrum. See Gorman, Copyright Protection for the Collection and Representation of Facts, 76 Harv. L. Rev. 1569 (1963). (Hereinafter "Gorman").

At the opposite end, verbatim use of independent <sup>as</sup> literary or artistic creation may virtually never be justified/fair use. See, e.g. Rohauer v. Killiam Shows, Inc., 379 F. Supp. 723 (SDNY 1974), Sayers v. Spaeth, COPY OFF. BULL. (No. 20, 625) (SDNY 1932) (fair use privilege not accorded to reproduction of words and melody of song in a history of popular music).

Historical research by the copyright holder falls

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<sup>29</sup> By "event" here we obviously mean the raw fact or datum as opposed to the style or form in which it is presented.

30

somewhere in between. Facts discovered or interpreted by the  
historical writer may be used without his permission, E.g.  
Eisenschiml v. Fawcett, supra. Cf. Gardner v. Nizer, 391 F. Supp.  
940 (SDNY 1975), Greenbie v. Noble, 144 F. Supp. 45 (SDNY 1957),  
though anything other than small quantities of his expression of  
those facts or ideas may not, Rosemont, supra.

As to the subject of a biographical study, again, facts  
about, or incidents from his life may be used, Rosemont, supra,  
Norman v. CBS, supra (incidents from life of Erza Pound contained  
in Norman's biography of him used in defendant's television program  
-- no direct copying alleged) but his own words and creations, to

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30 One possible interpretation of Bernard Geis, supra, is that  
the photographic frames merely "recorded" a historical fact and  
required no independent intellectual creation or expression by the  
person who coincidentally snapped the shutter.

31 This follows the general precept of the law that "ideas" may  
not be copyrighted, only their "expression" may.

32 In that case, also involving a claim of copyright infringement  
against The Implosion Conspiracy, the plaintiff had written an  
earlier history of the Rosenberg trial. Relief was denied primarily  
because Gardner's earlier work was deemed no longer in copyright,  
but it was also noted that although many of the events reported  
in the two books were similar, there were no instances of actual  
copying. On this ground, as well as the historical research/liter-  
ary-intellectual-creation dichotomy, Gardner is completely  
distinguishable from the instant case.

34 In Rosemont, only two direct quotations and one eight line  
paraphrase were taken from the copyrighted work.



the extent that they have been protected by copyright, may not.

The leading case in this area is Marvin Worth Productions, supra. There, defendants made a biographical film about the late comedian Lenny Bruce. The Court found that while fair use would apply to

"...prior copyrighted statements concerning the actions of the biographical subject (a use to which the plaintiffs concede the defendants are entitled...."

it was not appropriate

"...where defendants seek to utilize the independent intellectual creation of the biographical subject." Marvin Worth, supra at p. 1276. (emphasis added)

36

This distinction is crucial and dispositive.

The only legal question which remains is whether there is any authority for treating letters differently from other "independent intellectual creations" for purposes of the fair use defense.

The answer seems clearly in the negative, e.g. Folsom

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35 In this respect CBS could not have used substantial portions of Pound's Cantos without permission, even though they could have used, in another form, the biographical data which appears in some of them.

36 The Court in Marvin Worth clearly demonstrated the difference between the taking there and in Rosemont, supra. There is no conflict between the holdings of two cases; Marvin Worth is the logical (and here applicable) extension of Rosemont.

v. Marsh, 9 Fed. Cases 342 (No. 4901) (C.C.D. Mass. 1841) so long as the unauthorized taking is verbatim, Cf. Estate of Hemmingway, 53 Misc 2d 462 , 270 N.Y.S. 2d 51 (S. Ct. N.Y. Co. 1967) aff'd on other grounds 23 N.Y. 2d 341, 296 N.Y.S. 2d 771 (1968) 53 Misc. 2d at p. 468<sup>37</sup> and with the possible caveat that the letters must have been intended for publication by their author.

b) The Facts

The plaintiffs contended that the letters of their parents were precisely such unique, "independent intellectual creations" as were protected from verbatim copying, and introduced evidence to show that the letters were of high literary and artistic merit. See affidavit of John Simon. (286)

Uncontroverted evidence demonstrated that Ethel and Julius Rosenberg intended the letters for publication, and indeed many of them were published, under copyright, for the benefit of the plaintiffs, before their death.

Nizer himself described the value of the letters - which

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37 The Court there wrote:

"Aside from protection of privacy -- a question not here germane -- the literary property in the letters of a deceased author can adequately be protected by preventing verbatim publication. The only likely exploitation of such property would be in publication of collected letters, and such exploitation cannot be harmed by narrative use of the materials contained in the letters in a biography." Id. at 53 Misc.2d 468 (Emphasis added).



he significantly characterized as "love letters" - in terms of their "eloquence, pain, devotion and lyrical passion [which are] worthy of a great poet"; (256) not their factual content.

c) The Opinion

Despite the law, which would seem clearly to protect these letters, and the factually supported allegations as to the nature and purpose of the letters, the district court found that the letters were only

"[t]houghts and feelings [which] are historical facts relating to the trial." (672)

Whether this is a finding of fact or an exceedingly novel conclusion  
38  
of law, it is clearly erroneous.

3) The Type and Purpose of the Use Involved

a) The Law

A literary or intellectual work may generally be quoted

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38 It is unclear whether this was meant to be a finding of fact, or a determination of law, or both. If it is indeed intended to be a determination of fact, it is one which is not permissible at the summary judgment stage. See, e.g., Jaroslawicz, supra.

39 As discussed above, the information contained in the work may be used for another purpose such as biographical studies, it is only the work itself which may not be. As the Court stated in Marvin Worth,

"The facts of Bruce's life are available to all, and plaintiffs do not, of course, contest defendants' right to their use. With material other than that taken from Bruce ... Bruce's style, manner, philosophy and message can be displayed without the necessity of using copyrighted work. Id. at p. 1275.

without permission only in the context of a review or criticism. See, e.g., Nimmer, supra, at p. 648; Lawrence v. Dana, 15 Fed. Cas. 26 (No. 8136) (CC Mass. 1869).

A literary or intellectual work may also be used, albeit not directly or substantially copied, to "conjure up" the original for purpose of parody or satire, see e.g., Berlin v. E. C. Publications, Inc. 329 F.2d 541 (2d Cir.) cert. den. 379 U.S. 822 (1964). See generally, Note, Parody & Copyright Infringement, 56 Colum. L. Rev. 585 (1956).

b) The Facts

Plaintiffs claimed that the purpose of the infringing use<sup>40</sup> was not legitimate criticism or review, but rather to shore up, and give some degree of legitimacy to an otherwise shoddy, inaccurate and unoriginal manuscript (281).

Plaintiffs supported these allegations by affidavits of eminent historians, e.g. Professors William Appleman Williams and Eugene Genovese, who stated that the letters had thus been misused and should not be entitled to the fair use defense. (374, 382)

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<sup>40</sup> Nor, clearly was it parody, except in the genre of legal reporting.



Plaintiffs also offered circumstantial evidence proving their contention that the letters were inserted to "liven up" the book and turn it from a dull and inaccurate trial report to the purported "love story" of Julius and Ethel Rosenberg<sup>41</sup> by showing that Nizer hadn't even known of the existence of the letters until the manuscript was virtually complete.

Finally, plaintiffs contended that there was no need for verbatim use of the letters; the information in them could be "used" or transferred in some other way. This allegation was totally supported by Nizer's own deposition testimony. When asked about his choice of using facts from the letters or extracts in answer to the question

"Fact or quotation?"

he answered:

"Either way. Sometimes I would take the fact in the letter and state it. Sometimes I would use the quote depending on the writing presentation."<sup>42</sup> Nizer dep. p.328.

<sup>41</sup> The Implosion Conspiracy was, amazingly but somewhat obscenely, actually promoted in this fashion. The jacket copy on the hard cover, for example read:

"The emotional content of the story is at times almost overwhelming, the love story of Ethel and Julius that endures through waves of hope and despair, and expressed in love letters between them while in the death house". (255-56),

while the back of the paperback edition called it "a profound and moving love story".

<sup>42</sup> If this is not a bold faced example of unnecessarily "appropriating the fruits of another's labor without alteration." Benny, supra, we do not know what is.

c) The Opinion

Notwithstanding all of the above, Judge Gagliardi found, following Judge Tyler, that

"... the quotations are used with discretion and with demonstrable purpose to illustrate from a historical point of view, the post-conviction appeals and petitions for clemency which were filed for Mr. and Mrs. Rosenberg." 361 F.Supp. 1068. (675)

This determination of disputed facts is wrong; making such a determination on summary judgment is entirely impermissible.

Jaroslawicz, supra; Heyman, supra.

4) The Quantitative Extent of the Work Used

a) The Law

As discussed above, where verbatim copying is involved, the courts will look to the amount of copyrighted material actually taken in determining whether an otherwise permissible use is "fair". Thus, the use of only two direct quotations in a book was deemed susceptible to the fair use defense, Rosemont, supra, as were the occasional interjections of "phrases from the original" Berlin, supra.

On the other hand, the appropriation of a complete artistic creation was not afforded fair use protection, Sayers & Spaeth, supra,<sup>43</sup> and the appropriation of hundreds of letters from a

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43 We believe that it is this taking of the whole creation (here a song with music and lyrics) which distinguishes Sayers from cases where only a portion (i.e. the lyrics without the music) was

(footnote continued...)



multi-volume biography of George Washington was also unprivileged.

44

Folsom v. Marsh, supra. See Public Affairs Assoc. Inv. v. Rick-

over, 284 F.2d 262 (D.C. Cir. 1960) vacated for insuff. record

45

369 U.S. 111 (1962) dismissed 268 F.Supp. 444 (D.D.C.1967).

The law is also relatively clear that in assessing whether the quantitative copying is fair use, evidence as to the "customary use" in the area is important, if not sometimes dispositive,

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See, e.g. Williams & Wilkins, supra, at pp. 1355-56; Holdredge

v. Knight Publishing Corp., supra; McDonald, Non-Infringing Uses,

46

9 Bull of the Copyright Soc. 466 (1962); Rosenfeld, Customary

Use as 'Fair Use' in Copyright Law, 25 Buffalo L. Rev. 119 (1975),

Note: 56 Colum. L. Rev. supra, at p. 595.

found fairly used. See Karll v. Curtis Publishing Co., 39 F.Supp. 836 (E.D.Wisc. 1941). One way of looking at the quantitative issue, then, may be that when the whole of a work, no matter how short is taken, the use is not fair, while physically longer portions of an extended work may occasionally be permissible. On the taking of a whole song, see also Withol v. Crow, 309 F.2d 77 (8th Cir. 1962).

44 The appropriated material was taken from a twelve volume, 6,763 word biography of Washington and constituted 5.2% of that work. It filled approximately 353 pages out of a total of 866 pages of the infringer's work.

45. Substantial testimony was presented there to show that library copying and even photocopying had been a "general practice" for almost 50 years.

46. McDonald wrote:

"Non-infringing uses are either 'fair use' as recognized in the decided cases or uses which are sanctioned by custom in the trade or in the businesses to which they relate." Id. (emphasis added).

b) The Facts

It is apparently uncontroverted that defendants copied verbatim a total of 1,957 words from a copyrighted work containing approximately 81,000 words. The infringing work is said to total approximately 229,000 words.

Plaintiffs submitted affidavit evidence that the custom in the publishing industry was to permit verbatim copying of no more than 300 words from any given work without seeking and obtaining permission from the copyright holder. (Olney Aff., 425)

Plaintiffs alleged and attempted to demonstrate that the defendant Doubleday knew of this practice and had in fact previously invoked it, requiring Walter and Miriam Schneir to obtain permission for their use of the Rosenberg letters in Invitation to an Inquest. Defendants, in depositions, refused to answer questions or produce documents relating to this.

c) The Opinion

Despite the issue of fact created by plaintiffs' allegations and evidence that the quantitative amount copied far exceeded customary use, and was therefore not fair use, the district judge

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47 Doubleday was apparently generally even more cautious than trade custom would require. It sought and obtained permission for the use of a quote from George Bernard Shaw which was used in one of the letters of Ethel Rosenberg which Nizer copied!



held that

"Fair use is a legal question to be determined by the Court, not by alleged industry practice." <sup>48</sup> (669)

This holding was incorrect as a matter of law.

Further, although he stated

"[t]hat there is no question to be tried as to whether the amount of copying is quantitatively substantial does not, however, mean that there is no factual issue to be resolved as to this issue..." (670).

Judge Gagliardi went ahead and found that the copying was not quantitatively substantial. This finding was impermissible on a motion for summary judgment, and requires reversal.

5) The Qualitative Extent of the Work Used

a) The Law

This factor obviously relates in large part to the nature of the work taken, C(3) supra. There are, however, additional criteria. The Folsom case suggests that, regardless of quantity, if you appropriate the best or the crux of an author's work, you <sup>49</sup> may have taken its entire qualitative value.

<sup>48</sup> Judge Gagliardi emphasized the nature of the fact question when he wrote of

"... the alleged standard rule in the publishing industry ... even if such a rule exists." Id. (emphasis added).

<sup>49</sup> The Court continued, as an example:

(Footnote continued...)

The Court wrote:

"One writer might take all the vital part of another's book though it might be but a small proportion of the book in quantity. It is not only quantity, but value, that is always looked to." Folsom, supra at p. 348.

A later court held that qualitative extent or value depends not only on the relative size of the two works, but also on the significance of the material as representing the heart or crux of the original. Shapiro, Bernstein & Co. v. P. F. Collier & Son, Co. 26 U.S.P.Q. 40 (S.D.N.Y. 1941).

b) The Facts

Plaintiffs alleged that defendants had indeed lifted the heart from their parents' death house letters. In support of this they could point to the actual letters employed by defendants and to Nizer's own words about the importance of the letters to his book (256). Plaintiffs also offered to produce expert witnesses, literary critics and historians, to testify to the crucial qualitative importance of the copied material to the copyrighted mater-

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"If a person should, under color of publishing 'Elegant Extracts' of poetry, include all the best pieces at large of a favorite poet, whose volume was secured by a copyright, it would be difficult to say why it was not an invasion of that right, since it might constitute the entire value of the volume." Id.



ial. Judge Gagliardi rejected such testimony on the ground that it was unnecessary (670-71).

Defendants claimed that their use of the letters was little more than "incidental", qualitatively of little importance to either the copyrighted or infringing works.

Given this clear factual dispute as to the qualitative importance of the appropriated material, Judge Gagliardi himself wrote

"Certainly, the qualitative impact of the copied material ... i.e. its importance to the work -- may present an issue as to which reasonable men can disagree, .... The ultimate resolution of the issue must turn on the subjective judgment of the trier of fact...." (670-71).

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Notwithstanding his own caveat, the Judge then proceeded to "subjectively" determine on an entirely incomplete record, that

"... the limited use of the letters in the latter sections [of Nizer's book] is not, in this court's view, quantitatively or qualitatively substantial...." (678)

Once again, it is clear that Judge Gagliardi sat as a trial judge, deciding issues of fact, in a manner which is entirely

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50 Judge Gagliardi actually repeated this a second time in a later portion of this opinion, writing,

"Undoubtedly the qualitative impact of copyrighted passages is a matter that to some extent turns on individual subjective judgment." (679)

impermissible on summary judgment, Heyman, supra; Jaroslawicz, supra, and his opinion must be reversed.

6) The Intent With Which the Material Was Used

a) The Law

In applying the equitable defense of fair use, it seems appropriate that the intent of the infringer should be taken into account. While irrelevant to a determination of infringement, it has been deemed relevant to the question of fair use. E.g. Crossland, supra, at p. 186 Peck, Copyright Infringement of Literary Works, 38 Marquette L. Rev. 180, 187 (1955).

The Courts will thus look both to the motive of the infringer and to his knowledge concerning infringement to determine whether the use is indeed a fair one. See Meredith Corp. v. Harper & Row, 413 F.Supp. 385, 386-88 (S.D.N.Y. 1975).  
51  
52  
Cf. Bernard Geis, supra.

The defense would only seem to be applicable when the intent in using the copyrighted material is to advance knowledge

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51 In that case the infringer had unsuccessfully tried to sell his work for some time before he hit upon the scheme of incorporating the plaintiffs' previously published material. The infringement was apparently just the boost his book needed, as he sold it shortly thereafter.

52 There, the infringing user "took" the Zapruder frames only after every attempt to secure permission had failed. The Court's decision in Bernard Geis can, and probably should, be read in terms of its finding of knowing appropriation, but without wrongful intent. Bernard Geis, supra.



and benefit the public, rather than to further enrich the author. See New York Tribune Corp., supra. Cf. Rosemont, supra; Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938); Crossland, supra, at p. 173.

b) The Facts

Plaintiffs claimed that Nizer's use of their parents' letters was an entirely and deliberately exploitative and commercial one. The choice of verbatim reproduction, rather than use of facts contained in the letters was a cavalier one based on the attractiveness for presentation, not the need for the information contained in them. Nizer's last minute incorporation of large quantities of the material was for purposes of commercial window-dressing and increasing the saleability of the book.

Finally, the use of the letters in defendants' promotion of The Implosion Conspiracy strongly supports plaintiffs' allegations that the copyrighted work was used solely to advance sales, not to advance knowledge or meet a need for dissemination of "historical facts". It is uncontroverted that the inclusion of the letters was frequently employed in the defendants' promotion of the book; that in promotional appearances for the book Nizer frequently read from the letters and otherwise exploited his use of them in every way possible. (See Wexley affidavit where Nizer focuses upon his "prized love letters") (443-446).

Additionally, of course, plaintiffs claim that the de-

defendants knew full well that they were infringing the plaintiffs' copyright, but that they took no steps whatever to obtain permission, although permission was sought from another as to a minor quote which appeared only in one of the copyrighted letters. 53

c) The Opinion

Even on the factually sparse initial papers, Judge Tyler thought there was a real question about the defendants' knowledge, motive and intent, and that resolution of that question was necessary to a determination of fair use. (113)

Judge Gagliardi, however, completely ignored the entire issue of defendants' intent, holding that

"the fact that the defendants may have used copied materials in the promotion of their book does not in itself prove that the copied materials are important to the work itself." (668)

The district court thus completely ignored the existence of a genuinely disputed issue of fact, whose determination was highly relevant to a finding of fair use. Accordingly, under the applicable standards his grant of summary judgment must be reversed.

7) The Effect On The Original

a) The Law

This factor, described in the new Copyright Law as the

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53 This was the Shaw quote from St. Joan. See The Implosion Conspiracy, copyright page, Nizer dep. p. 52. Exhibit B of the complaint, and fn. 47, supra.



"effect of the [infringing] use upon the potential market for or value of the copyrighted work"

has been considered by many as the "central question" in determining fair use. See e.g. 2 Nimmer, §145 at p. 646. Rosenfeld, supra, 54 Buff. L. Rev. at p. 120; Note, 56 Colum. L. Rev. supra at p. 596, Crossland, supra, at p. 187.

An examination of the cases completely supports this analysis. See Williams v. Wilkins, supra; Nimmer, supra, at pp. 655-56. .

Where the infringing work does provide some substitute value for the original, fair use will almost never be applied. See e.g. Withol v. Crow, supra; Sayers v. Spaeth, supra.

The diminution of value required to negative fair use need not be a present one; if the infringing work diminishes any future use by the copyright owner, fair use will not be found, see e.g. the example at 2 Nimmer pp.646-47; Rohauer v. Killiam Shows, Inc., supra, at p. 733, fn. 9; Note, 54 B.U.L.Rev. 689,693 (1974).

b) The Facts

It is undisputed that, at the time this action was brought, the copyrighted material had been out of print in the United States

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54 On the preliminary injunction motion, Judge Tyler found this factor weighed so heavily toward defendants as to virtually preclude the possibility of plaintiffs prevailing on the merits. (107)

(Footnote continued ...)

for some 20 years.

During the course of the action, plaintiffs announced  
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their prior intention to republish the work; further, and  
perhaps even more significantly, they published a book of their  
own, We Are Your Sons. The majority of their book consists of  
letters from their parents, including letters which were used by  
the defendants here. It is alleged that the prior infringing pub-  
lication of these letters decreased the demand for the plaintiffs'  
own rightful use of their copyrighted material by virtue of the  
substitution effect described above.

The infringing work damaged potential further sales of  
both We Are Your Sons and any possible reprint of The Death House  
Letters, in that, as plaintiffs' counsel wrote,

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This portion of his opinion was roundly criticized by Nimmer,  
who wrote:

"The Meeropol court was further moved by the fact that  
plaintiffs' copyrighted work containing such letters had  
been out of print for almost 20 years .... The fact that  
a work is out of print surely cannot mean that the copy-  
right therein is vitiated. Works out of print are pub-  
lished in new editions when the demand becomes sufficient.  
Such demand may never arise if competitors may freely  
copy the out of print work." 2 Nimmer, 1976 Supp. at p.63.

55 Their intentional decision not to do so earlier was based on  
their decision, and that of their trustees, to

"husban[d] the plaintiffs' inheritance whose value would  
grow over the passing years and whose worth would be  
even more appreciated in the years to come." (259)



"While alluding [to] the letters in promoting the sale of [the Implosion Conspiracy], Nizer imports that these letters were contrived by the Rosenbergs to mislead their supporters and the public at large."  
(283-284)

In other words, in addition to the gross competition between the plaintiffs' and defendants' works, defendants mis-use of plaintiffs' material cast such false aspersions on the sincerity and authenticity of the letters as to deter members of the public from buying or even from reading them in the future.

The defendants suggest that their use of the letters may actually have increased the demand for the original work.

c) The Opinion

Although, as Judge Tyler's opinion implied, diminution is perhaps the key factor in determining fair use, and although there was a clear factual dispute with regard to diminution, Judge Gagliardi gave this issue short shrift. He "assumed" damages, but stated, somewhat enigmatically,

"This fact alone, however, is not in this court's view sufficient to preclude the defendants from claiming fair use." (667) (emphasis added).

The issue was not whether defendants could claim fair use, it was whether they had proved it.

8) The Amount of the User's Labor Involved  
And The Benefit To The User

a) The Law

The courts will look to the amount of independent research,

e.g. Rosemont, supra, and independent creative effort, e.g. Benny v. Loews, supra, which the infringing author employs determining fair use. The scope of privilege is also partially determined by the benefit to the user, e.g. Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950). Folsom v. Marsh, supra, but

"... no one is entitled to save time, trouble and expense by availing himself of another's copyrighted work for the sake of making an unearned profit." Ball, Copyright and Literary Property, p. 261.

b) The Facts

As already discussed, plaintiffs contend the defendant Nizer did little or no independent research and no independent creation which was not distorted, fictionalized or otherwise erroneous.

The benefit to Nizer and the other defendants was, plaintiffs alleged, not legitimate time-saving, but a vast increase in monetary profits derived from the unauthorized appropriation and use of their parents' letters, which use served both to legitimize, dramatize and add some measure of value to an otherwise valueless work.

The defendants, of course, denied all these allegations.

c) The Opinion

The district court held that the amount of independent work done by Nizer was entirely irrelevant (668) and apparently failed to consider whether defendants reaped undeserved rewards,



monetary or otherwise, from their appropriation of the copyrighted material, despite the clear factual dispute which existed on this issue.

In this, as in its consideration of the preceding seven factors, the district court erred in its interpretation of both the law and its powers on summary judgment and its decision should be reversed.

## POINT II

### THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S CAUSE OF ACTION FOR DEFAMATION

In their complaint, plaintiffs alleged that The Implosion Conspiracy defamed them in that, inter alia, it falsely portrayed their relationship with their parents, including the "fact" that their parents cared more for their impending martyrdom than for the children, that they were turned over to and used as pawns by communist-controlled committees, that even before the arrest and trial of their parents they were deprived of normal love and affection and became neurotic as a result, and that following the execution they disavowed their parents and their beliefs.

The main defense pleaded by defendants, and upon which the district court based its opinion, was assertion of the First Amendment "privilege" derived from the Supreme Court's opinion in New York Times v. Sullivan, 376 U.S. 254 (1964).

The district court held that, under New York Times and subsequent decisions, the plaintiffs were "public figures;" that as such they could recover only on a showing of "actual malice;"<sup>56</sup>

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<sup>56</sup> It is by now clear that this "actual malice is not the equivalent of common law malice, but means that the defendants must have published the defamatory material either knowing it to be false, or with a "reckless disregard of the truth." New York Times, supra, St. Armant v. Thompson, 390 U.S. 727, 731 (1968).



that the record was bare as to any evidence from which malice might be shown; and that summary judgment should thus be granted.

The district court's decision was rendered very shortly after the Supreme Court issued its opinion in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) and, of course, prior to Time Inc. v. Firestone, 424 U.S. 448 (1976) and other commentary and case law exegesis of Gertz. A careful reading of Gertz and those subsequent Supreme Court decisions which further illumine the Gertz opinion leads inescapably to the conclusion that the district court wrongly decided the crucial question of whether plaintiffs were or were not "public figures," and therefore applied an incorrect standard of fault which plaintiffs had to meet to recover.

In addition, the district court ignored extant law, again further illumined by Firestone,<sup>57</sup> that even public figures have areas of "privacy," defamatory invasion of which are not subject to First Amendment privilege.

Finally, as also discussed infra, the Court erred in granting summary judgment based on plaintiff's alleged inability to demonstrate defendants' fault, because it was the Court's own incorrect action in denying discovery which foreclosed plaintiffs from the requisite showing.

If this Court agrees with plaintiffs in any of these three conclusions, it must reverse the decision below. The three, with

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<sup>57</sup> Plaintiffs of course do not concede that they are "public figures" whether through their parentage or by virtue of any other reason.

their subsidiary issues, will be discussed seriatim.

A. The Plaintiffs Were Not "Public Figures"

The Court decided that plaintiffs were "public" figures, and thus subject to the burden of proving malice, because they

1. "assumed roles of especial prominence in the society," "inviting attention and comment" and
2. were "children of famous parents," who therefore achieved "general fame or notoriety in the community." )A 189)

Its decision on the first ground misinterprets and misapplies Gertz; its second, rather novel, conclusion of law flies in the face of the rationale of Gertz and Firestone and of a number of other applicable decisions. A brief discussion of those decisions is necessary to answer the first crucial question posed by the district court's decision.

1. Who is a Public Figure After Gertz and Firestone?

The New York Times privilege was extended from "public officials" to "public figures" in Curtis Publishing Co. v. Butts, and Associated Press v. Walker, 388 U.S. 130 (1967). The defamed plaintiffs in those cases were deemed "public figures" because of their "positions alone", because they assumed "influential roles in the ordering of society", id. at p. 164 (Warren, CJ, concurring) or because of

"purposeful activity amounting to a thrusting of [their] personalit[ies] into the vortex of public controversey." Id., 388 U.S. p. 155.



The Supreme Court extended the privilege from those "public figures for all purposes" to otherwise private persons caught up in newsworthy events of public interest in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). See Time, Inc. v. Hill, 385 U.S. 374 (1967) (similar extension in privacy case).

In Gertz, however, the Court retreated from the Rosenbloom privilege and returned to a test oriented to the person defamed, not the event in which he or she achieved notoriety.

In determining whether a person is a public figure the Court wrote:

"Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure questions to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation. Gertz, id., 418 U.S. at 351-52.

The Gertz test was refined and reapplied in Time Inc. v. Firestone, supra where the Court appears to have confined the "public figure classification" to include only those plaintiffs who have invited publicity by their own voluntary acts. See,

57a Mrs. Firestone sued her well-known husband for separate maintenance; he counterclaimed for divorce on the grounds of cruelty and adultery. Although she instituted the action, the Court characterized her as a litigant

"...drawn into a public forum largely against [her] will in order to attempt to obtain the only redress available to [her]..." Id., 424 U.S. at 457.



e.g. Note: Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to Relatives of Public Persons, 49 So. Cal. L. Rev. 1131 (1976) at p. 1203.

The Court further suggested that certain "personal matters" do not give rise to the expectation of publicity, even when the plaintiff's activities have been the subject of publicity before,<sup>58</sup> or where the plaintiff at least partially involves herself with the press in response to the publicity.<sup>59</sup>

Finally, the Court apparently decided that a divorce is not a public controversy into which one can "thrust himself"---even though it occurs in a public court (See fn. 57a supra).

Under the rationales and fact patterns<sup>60</sup> of these two most recent Supreme Court decisions, it seems difficult to conclude that Michael and Robert Meeropol are or were public figures.

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58 Prior to the divorce, Mrs. Firestone was prominent among the '400' of Palm Beach Society. Her "appearances in the press were evidently frequent enough to warrant her subscribing to a press-clipping service". Id. at 485 (Marshall, J. dissenting).

59 Mrs. Firestone held several news conferences during the course of the divorce proceeding. Id. at p. 485 (Marshall J. dissenting) This fact discounts the suggestion in Gertz that one may be classified a public figure solely because one may have "access to the media" to rebut defamatory charges.

60 In writing of the Supreme Court's "factual" determination that the plaintiff in Gertz was not a public figure, Professor Robertson noted,

"Elmer Gertz was a "prominent" individual. He had authorized four books and (according to this own affidavit) "thousands" of articles appearing in "historical, legal, literary...and other publications"; he had been the subject of over forty articles in Chicago papers; he had made many television and



To the extent that they are known by the public at all, it is only because their parents were involuntarily drawn into a judicial proceeding and its attendant publicity,

"largely against their will....to defend themselves against actions brought by the State...." Firestone, supra at p. 457.

The very limited extent to which the children were consequently "thrust" into prominence<sup>61</sup> was certainly involuntary as to them;<sup>62</sup> further, regardless of their participation in public

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(continued from the preceding page)

radio appearances in Chicago and elsewhere; he had served as an officer to many civic and professional organizations. Under pre-Gertz decisions, this degree of notoriety would have qualified plaintiff as a public figure, nevertheless, the Supreme Court found him private. This application of the definitional criteria to the facts of Gertz unmistakably signals a narrowing of the public figure category." Robertson, Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc., 54 U. Tex. L. Rev. 199,

222 (footnotes omitted).

Professor Robertson's article was cited with approval in this Court's recent decision in Buckley v. Littell, 539 F.2d 882, 888 fn. 3 (2d Cir. 1976), cert. den. 45 U.S.L.W. 3489 (Jan. 18, 1977).

61 The amount and degree of the children's participation in attempts to save their parents is a factual dispute which was not considered or resolved by the Court below, although the record clearly demonstrates the opposing parties' entirely different assessment of the facts.

62 At most the defendant, Nizer himself, describes the children as "pawns." Statement of Facts, supra, at p. 18.



events,<sup>63</sup> there was no "expectation of publicity" in their personal relationships and intimate moments with their parents, nor were those private activities anything in which the public had a legitimate interest.

Clearly then, plaintiffs were not "voluntary" public figures within the parameters of the Gertz and Firestone decisions. The questions which remain after those cases are

- a. whether there is, any longer, a class of "involuntary public figures", and
- b. whether the relatives, and more particularly the children of public figures can involuntarily take on that designation, and
- c. who is to decide those questions.

Additionally, to the extent that plaintiffs are found not to be, or may not be deemed public figures, the question becomes what standard of fault must be met to permit recovery.

These questions will be discussed in turn.

a. Were Plaintiffs "Involuntary Public Figures?"

The Gertz decision itself, while allowing for the existence of a class of "involuntary public figures" thought such plaintiffs would be "exceedingly rare."

Commentators have interpreted this to mean that

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<sup>63</sup> This, according to the plaintiff, Michael Meeropol, consisted solely of attendance at just three rallies in the period immediately prior to the execution of their parents. (138)



"...unless the plaintiff is a household name, <sup>64</sup> he will not incur public figure status without voluntary publicity seeking on his part." Robertson, supra. Tex. L. Rev. at pp. 222-23.

But neither Michael and Robert Meeropol, nor Michael and Robert Rosenberg are household names -- or indeed names known to any large number of the American people.

Thus, since plaintiffs did not voluntarily seek publicity,<sup>65</sup> are not household names,<sup>66</sup> and achieved whatever notoriety they have or may ever have had through a legal proceeding, Firestone, supra, they were not involuntary public figures within the meaning of Gertz & Firestone and subsequent cases.<sup>67</sup>

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<sup>64</sup> We can all imagine persons who totally abjure publicity yet who are "household names" -- the late Howard Hughes is the most obvious example.

<sup>65</sup> The affidavit of Marshall Perlin dated March 3, 1974, (A 152) clearly states,

"[The plaintiffs] were, with rare exception, kept in protective isolation to the extent possible and feasible up to the time of the execution of their parents." [154] See also Supplemental Complaint 72-73.

<sup>66</sup> It is entirely doubtful that even those who recall the story of Ethel and Julius Rosenberg itself would be able to recount the names of their sons.

<sup>67</sup> It is not clear whether New York recognizes a category of "involuntary public figures"--other, perhaps, than the Howard Hughes example--since the New York Court of Appeals has written, post-Gertz,

"The essential element underlying the category of public figure is that the publicized person has taken an affirmative step to attract public attention." James v. Gannett, Co., Inc. 40 N.Y.2d 415, 386 N.Y.S.2d 871, 876 (1976).



b. Did Plaintiffs Become Public Figures Solely By Virtue Of Their Parentage?

The district court assumed, without citing any authority, that plaintiffs somehow "became" public figures because they were the children of Ethel and Julius Rosenberg, whom he described as "famous parents".

The rationales of the Gertz and Firestone cases, as discussed above, cannot support such a conclusion. One's status as the relative of a "public" or "famous" person, without more, simply will not satisfy the requirement of "voluntary thrusting" set forth there, particularly when the relationship itself is "involuntary." <sup>68</sup> See generally, Note, 49 So. Cal. L. Rev., supra.

The fact that the "public figure" status attributed by the district court occurred when the plaintiffs were under ten years of age further compels this conclusion. New York law is exceedingly protective of the rights of such children, specifically holding that their rights may not be infringed or limited by their parents. See, e.g. Vladimer v. Mount Vernon Hebrew Camps, Inc., 9 NY2d 21, 210 NYS2d 520 (1961) <sup>69</sup> (parents cannot

<sup>68</sup> It is the "involuntariness" of parentage, like that of color, which led the courts to include illegitimacy among those "suspect classifications" requiring special scrutiny under the equal protection clause. See Levy v. Louisiana, 391 U.S. 68 (1968).

<sup>69</sup> It is against the "strong public policy" of the State to allow a child to "--be penalized for [its] father's indiscretion". Id., 9 NY2d at p. 27.



settle child's cause of action for negligence without judicial approval) N.Y. General Obligations Law §3-105 (requiring judicial approval for entertainment contract involving a child).

While there are few cases on the subject of relatives of "public figures," <sup>70</sup> those which have been decided post-Gertz <sup>71</sup> clearly support plaintiffs' position. See Corbett v. Register Publishing Co., 33 Conn. Sup. 4, 356 A.2d 472 (1975), <sup>72</sup> and Troman v. Wood, 62 Ill. 2d 184, 340 NE2d 292 (1976). <sup>73</sup>

The district court's legal "conclusion" that the children of public figures automatically become public figures for Gertz purposes was thus incorrect, and could not properly be used as a basis for imposing the New York Times standard on plaintiffs.

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<sup>70</sup> Ironically, the defendants in Time, Inc. v. Firestone claimed, inter alia that Ms. Firestone became a public figure because she was married to Russell Firestone, a public figure (Petitioner's brief at pp. 35-36). The Supreme Court, however, did not deal with this contention except, perhaps significantly, to ignore it.

<sup>71</sup> An interesting pre-Gertz analogous right of privacy case permitted recovery to the mother of a murder victim where the mother's picture and non-judicial statements at the trial of the murderer were reported by defendant. Martin v. N.Y. Metropolitan News Co., discussed infra, at p. 101.

<sup>72</sup> The court found one plaintiff, the father, a public figure, and required him to prove malice in order to recover. His wife and son however, were not deemed public figures, and were permitted to recover on a showing of negligence. Id. 356 A.2d at pp. 476-77.

<sup>73</sup> There the mother of a gang member was held not to be a public figure, although the alleged defamatory reference to her appeared in an article about a series of burglaries committed by the gang which the court recognized as clearly of legitimate public interest.



c. Who Decides Whether Plaintiffs are "Limited" Or "Involuntary Public Figures?"

An interesting question, and one not considered by the court below, was that of who determines the factual question of whether particular defamation plaintiffs are or are not public figures. Although a jury trial had been waived as to Nizer and Doubleday, the right to a jury was specifically reserved as to Fawcett. Meeropol v. Nizer, 505 F.2d 232 at 238 (1974). Thus, while this question was academic at the time Judge Tyler rendered his decision, it was not when that earlier opinion was unthinkingly applied to Fawcett.

While there is no present decision binding on this court, the weight of authority clearly suggests that the disputed determination of whether a defamation plaintiff is a public or private figure is one to be made by the jury. See Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161, 168 (Mass. 1975).<sup>74</sup>

74 The Massachusetts Supreme Court wrote:

"A full statement of the rule would seem to be that the question whether the plaintiff is a public official or a public figure is one for the court to answer whenever (a) all of the facts bearing thereon are uncontested or agreed by the parties (b) the case is tried before a judge without a jury, or (c) all of the facts bearing thereon are specially found and reported by the jury by way of answers to special questions submitted to them; and that otherwise, in a case tried to a jury, it is a question for the jury to answer after instructions by the judge on the applicable law and on what facts must be found to constitute the plaintiff a public official or a public figure." Stone, supra, 330 N.E.2d at pp. 170-171.



Cf. The Supreme Court, 1973 Term 88 Harv. L. Rev. 41, 144 fn. 32 (1974).<sup>75</sup> Bolam v. McGraw-Hill, Inc., 52 AD2d 762, 382 NYS2d 772 (1st Dept. 1976) (It is a "triable issue.")

The language in Gertz itself, noting that

"[n]one of the prospective jurors called at the trial had ever heard of [Gertz] prior to this litigation..." 418 U.S. at 352,

supports this conclusion.

Plaintiffs vigorously contested any allegation that they were "public figures;"<sup>76</sup> at least with regard to Fawcett they were entitled to a jury determination of this key question, and for this, among many other reasons, summary judgment was inappropriate.

d. What Is The Post-Gertz Standard of Proof For Private Defamation Plaintiffs?

In addition to developing a new "public figure test," the Supreme Court in Gertz held,

"so long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Gertz, supra at p. 347.

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<sup>75</sup> That article stated that where there was a dispute as to whether plaintiffs were public figures, summary judgment was inappropriate, suggesting that the determination was a jury question.

<sup>76</sup> See, e.g. Perlin affidavit (152). Even Judge Tyler himself noted that

"I think Mr. Perlin can plausibly argue that maybe I misconstrued Gertz." Transcript of argument on certification.

In other words, after Gertz, while private figures were not required to prove malice in order to recover, neither were they permitted recovery on a theory of libel per se. This novel and wide reaching pronouncement by the Court predictably inspired much speculation by commentators, see e.g. Robertson, supra, Eaton, The American Law of Defamation Through Gertz v. Welch, Inc. and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349 (1975),<sup>77</sup> Keeton, Defamation and Freedom of the Press, 54 Tex. L. Rev. 122 (1976), and a period of uncertainty in both the state courts, and in federal courts seeking to determine how those state courts might rule.<sup>78</sup>

The law, accordingly, was far from settled when Judge Tyler dismissed Count II below. Now, however, the line-up of states, erratic as it may seem, is clear.

Both Massachusetts, the state of plaintiffs' domicile, and Connecticut, the domicile of the defendant Fawcett, have adopted a simple negligence standard. See Stone v. Essex County Newspapers, Inc., supra, 330 N.E.2d at 168; Comment, 10 Suffolk Univ. L. Rev. 126 (1975) (Mass.) and Corbett v. Register Publishing Co., supra. 356 A.2d at p. 477 (Conn.).

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<sup>77</sup> This article was also favorably cited in Buckley v. Littell, supra.

<sup>78</sup> See, e.g. Cardillo v. Doubleday, 518 F.2d 638, 639 (2d Cir. 1975).



The majority of states have adopted this rule.<sup>80</sup>

New York has adopted a standard somewhere between malice and negligence in holding that a private individual must prove that the defendant has been "grossly irresponsible" by a preponderance of the evidence.<sup>81</sup> Chapadeau v. Utica Observer-Dispatch, 33 N.Y.2d 196, 379 N.Y.S.2d 61 (1975). See Commercial Programming Unlimited v. CBS, 50 A.D.2d 351, 378 N.Y.S.2d 69 (1st Dept. 1975).<sup>82</sup>

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80 See, e.g. Troman v. Wood, supra (Ill.). Hilton v. UPI, 303 So. 2d 650 (Fla. App. 1974). Exner v. AMA, 529 P.2d 863 (Wash. 1974), AAFCO Heating & Airconditioning Co. v. Northwest Publishing, Inc., 321 NE2d 580 (Ind. 1974), Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76, 84. Walker v. Colorado Sun Springs, Inc., 538 P.2d 450 (Colo. 1975), Thomas H. Maloney & Sons v. EW Scripps Co., 43 Ohio App. 2d 105, 334 N.E.2d 494 (1974) cert. den. 423 U.S. 883 (1975).

81 It should be noted that while the standard adopted by New York is somewhat stronger than the "negligence" standard permitted by Gertz, it is somewhat easier to prove because of the choice of "preponderance of the evidence" rather than proof by "convincing clarity."

82 In that case, applying the newly announced "grossly irresponsible" standard, the First Department denied summary judgment where, as here, plaintiffs pointed to and substantiated a number of factual errors in defendant's publication. The Court wrote:

"In contrast to the plaintiffs' showing, defendants' affidavits, which were offered to demonstrate the manner in which the news reports were compiled, were entirely inadequate to preclude plaintiffs as a matter of law. The only affiant with knowledge was defendant John Stoessel. To the extent that he set forth the results of his own investigation, much of his statements were conclusory and there was little attempt to supply documentation. No affidavits were obtained from the governmental agencies allegedly

(Footnote continued)



Thus, whether Massachusetts, Connecticut or New York law applies to any particular defendant, if plaintiffs are not "public figures," the malice requirement imposed by Judge Tyler was wrong as a matter of law, and the decision below must be reversed.

B. Even Assuming Plaintiffs Were Public Figures, the New York Times Standard Does Not Apply to Defamatory Statements Concerning Private or Personal Events or Relationships.

Even at the high water mark of privilege, the Supreme Court cautioned:

"We are not to be understood as implying that no area of a person's activities fall outside the area of public or general concern. We expressly leave open the question of what constitutional standard of proof, if any, controls the enforcement of state libel laws for defamatory falsehoods published or broadcast by news media about a person's activities not within the area of public or general interest." Rosenbloom, supra, at p. 44 n. 12.

New York law has always been clear in limiting "privilege" or "fair comment" to public matters, cautioning that privileged

"...criticism does not follow a public man into his private life, and pry into his domestic concerns." Devany v. Shulman,

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(continued from the preceding page)

contacted and where documents were submitted, they were neither conclusive nor necessarily supportive of defendants' position. With regard to the information obtained from research assistants, there is insufficient material to corroborate the information which they allegedly obtained and reported to Stoessel and indeed, no affidavits were submitted from those investigators. In all, we find factual issues requiring the denial of summary judgment. Id., 378 N.Y.S.2d at p.73, 50 A.D.2d at p. 355.



53 N.Y.S.2d 401, 403 (1944) aff'd 269  
App. Div. 1022, 59 N.Y.S.2d 401 (1st  
Dept. 1945).<sup>83</sup>

The district courts in this circuit have followed a similar rule, e.g. Stearn v. McLean-Hunter, Ltd., 46 FRD 79 (SDNY 1969) (privilege does not extend to a plaintiff's personal conduct rather than public function).

Reviewing the Supreme Court cases, Judge Levet wrote:

"Hence, to extend the Times doctrine to include every aspect of a person's private life is an unfounded extension of the constitutional doctrine." Buckley v. Esquire, 344 F. Supp. 1133, 1134 (SDNY 1972).<sup>84</sup>

In Firestone, the Supreme Court was clearly confronted with the issue, and equally clearly came down on the side of protection of private matters.

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<sup>83</sup> Devary relies on an early case, Triggs v. Sun Printing and Publishing Association, 179 N.Y. 144, 155-56 (1904) for this principle. The same principle has been applied in New York post-New York Times v. Sullivan. See Gilligan v. King, 48 Misc. 2d 212 264 N.Y.S. 2d 309 (S.Ct. N.Y. Co. 1965).

<sup>84</sup> The material in that case, to which privilege was deemed inapplicable, concerned William F. Buckley, Jr., "concededly a public figure." Buckley v. Littell, supra. Significantly, it involved an incident from Buckley's childhood in which he and his siblings allegedly desecrated a prayer book in a local church where the minister's wife had sold a house to a Jewish family. Note, Univ. So. Cal. L. Rev., supra at p. 1168.

The Florida Supreme Court had written:

"...regardless of the prominence of the person defamed, there may still be a sector of his private life which is of no real concern to the public, and this private sector should be as zealously protected from defamation as is the right of the public to be concerned and thus informed, about the public sector of his life." 271 So.2d 745, 748-51 (Fla. 1972).

In holding that the "marital difficulties" of a previously publicized person were not a legitimate subject of public concern such as to justify applying the New York Times privilege, the Supreme Court obviously accepted the proposition so eloquently stated by the lower court.

The fact patterns of these cases and the citation of Griswold v. Connecticut, 381 U.S. 479 (1965) in Rosenbloom, supra at p. 48, are significant.

They encompass what our general standards of propriety have long protected -- a "zone of privacy" within the home and family, encompassing marital sexuality, Griswold, supra, family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944), and the rearing and education of children, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).<sup>85</sup>

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85 These four cases were cited as rights included in "the guarantee of personal privacy" in the Supreme Court abortion decision, Roe v. Wade, 410 U.S. 113, 152-53 (1973).



Whether or not the plaintiffs and their parents were public figures, and whatever "legitimate public concern" there may have been in the trial and subsequent judicial and extra-judicial proceedings which sought to save the Rosenberg's lives, the private relationships of parents and children were not public issues, or areas of public concern. The public had no more "right" to know whether the Rosenberg's children were neurotic than it did to inquire about the mental health of the prosecutor's children or those of the sentencing judge.

C. Summary Judgment Was Entirely Inappropriate and Should Not Have Been Granted.

As we have demonstrated above, there is substantial dispute as to whether plaintiffs are "public figures",<sup>86</sup> and substantial authority that they are not.

The rule is clear in this Circuit that, in defamation cases, as in all other actions, in determining whether summary judgment is to be granted, the court must resolve all ambiguities and draw all reasonable inferences in favor of the party opposing the motion. E.g. Goldwater v. Ginzberg, 414 F.2d 324, 337 (2d Cir. 1969) cert. den. 396 U.S. 1049, reh. den. 397 U.S. 978 (1970) citing U.S. v. Diebold, Inc., 369 U.S. 654 (1962).

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<sup>86</sup> As discussed at length above, plaintiffs, have vigorously claimed that they were sheltered and secluded from the publicity surrounding their parents' case, that they sought privacy and anonymity, and that in all other respects, they were truly "private" persons.

Applying this test to the instant case, it is clear that for purposes of the summary judgment motion Judge Tyler had to find them private figures.

Had he done so, either a negligence or "gross irresponsibility" standard would have applied, and the plaintiffs' allegations and evidence would have to be viewed in light of those standards.

Instead, Judge Tyler examined the material before him solely to determine whether plaintiffs could prove 'actual malice,' which he concluded they could not.<sup>87</sup> Thus, as a matter of law, since the district court applied an incorrect and overly stringent standard to the plaintiffs' burden of proof, the grant of summary judgment must be reversed.

The decision granting summary judgment was also incorrect in two other distinct ways, which will be discussed in turn.

- i. There was sufficient evidence to infer that plaintiffs could prove negligence and/or malice.

Doubleday and Nizer

First, as to these defendants there was some evidence that the book was actually viewed as a "fictionalization,"

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<sup>87</sup> As discussed briefly, infra, we believe there was some evidence from which traditional malice might have been found, and that adequate discovery would have permitted the discovery of more such evidence.



although it was represented otherwise to the public; that the defendant Nizer seriously misrepresented the extent of his research,<sup>90</sup> failed to check sources, and that the defendant Doubleday did not employ appropriate or ordinary review of the material contained in the book.<sup>91</sup>

After Gertz, when (as for the sake of the summary judgment motion) plaintiffs are not public figures, ordinary principles of defamation will apply; see, e.g. Bolam v. McGraw-Hill, supra and the allegations described and facts adduced above would be adequate to defeat a motion for summary judgment. A publisher no longer needs actual knowledge that the material is false, see, e.g. Robertson, supra at p. 257; he may be defamatorily negligent where he extemporizes on the facts known to him for the purpose of sensationalism. See Lawlor v. Gallagher President's Report, Inc., 394 F. Supp. 721 (S.D.N.Y. 1975).

The fact that such negligence or extemporizing occurs within the context of an allegedly "historical work" does not change the applicable standard. See Bavarian Motor Works Ltd.

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90 See Statement of Facts, supra, p. 12, and p. 42, fn. 24.

91 The manuscript was apparently never given to the legal department to review for possible libel and invasion of privacy, and the editor never independently checked sources (McCormick dep.). While this was alleged by McCormick to be standard practice plaintiffs allege, and hoped to show on further discovery, that it was a very different, far less stringent review than that practiced by the same publisher and the same editor on a previous book which also concerned the Rosenberg case, Invitation to an Inquest, see Statement of Facts, supra, at p. 21.



v. Manchester, 61 Misc. 2d 309, 305 N.Y.S.2d 593, 596 (S.Ct. N.Y. Co. 1969).

And, the New York courts have held, where plaintiffs show that the work complained of contains substantial inaccuracies,<sup>87</sup> the defendant's affidavit setting forth how it gathered the information and disclaiming malicious intent is insufficient to permit summary judgment. See Commercial Programming, supra at <sup>88</sup>fn. 82, supra.

This Court has held that neither an author nor publisher may escape liability by reliance on the use and reproduction of another's words, Goldwater v. Ginzberg, supra, and the Supreme Court in Gertz strongly suggested that a publisher may not avoid an assessment of fault in his publication of defamatory material because he states that he had no reason to believe the material was untrue, and depended on the reputation of the author.<sup>89</sup>

Gertz, supra at pp. 327-28.

<sup>87</sup> As plaintiffs here did with regard to much of the defendants' book, not merely the material which defamed them, see, e.g. 262, 274-75; Answers to Interrogatories, discussed supra at pp. 13-14, 17.

<sup>88</sup> Also significantly, and in close analogy to the instant case, the Court there noted,

"...despite defendants' claims of reliance upon information received from governmental agencies in preparing the programs, it does not appear that the Department of Education, which is the supervisory agency for data-processing schools, was ever contacted." Id at p. 355.

<sup>89</sup> This was both pleaded by Doubleday in its answer, (35) and claimed by McCormick in his affidavit (150-151).



Under all these cases, the allegations made by plaintiffs, coupled with the showing they were able to make, even in the absence of discovery (See [ii] infra) clearly provide a factual basis for a finding of negligence and/or, even actual malice. Accordingly, summary judgment should not have been granted.

### Fawcett

Everything which has been said about Doubleday and Nizer is equally true with regard to Fawcett, but here the case for fault, and against summary judgment, is even stronger.

Fawcett did not publish and distribute the offending material until substantially after the commencement of this lawsuit. Even though they knew of plaintiffs' claim that the material concerning them was false and defamatory, they apparently took no steps to check or verify the accuracy of the information contained in the book, apparently preferring to rely solely on the warranty in their contract with Doubleday.

Publishers who have been warned but then do not independently check defamatory material are extremely likely to be found either negligent or actually malicious. See, e.g., Airlie Foundation, Inc. v. Evening Star Newspaper Co., 337 F. Supp. 421 (D.D.C. 1972), O'Brien v. Tribune Publishing Co., 7 Wash. App. 107, 499 P.2d 24 (Wash. 1972) cert. den. 411 U.S. 906 (1973), Cf. Alioto v. Cowles Communications, Inc., 519 F.2d

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92            This warranty is described in Meeropol v. Nizer, supra, 505 F.2d at p. 236.

777 (9th Cir. 1975) cert. den. 423 U.S. 930 (1976).

Further, because plaintiffs were entitled to a jury trial against Fawcett, summary judgment was especially inappropriate. As one district court has written,

"Although summary judgment in a defamation action might serve prophylactic function of sparing authors and publishers the chilling effect of litigation<sup>93</sup> '[t]his procedural weapon is a drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury.' Heyman v. Commerce and Industry Insurance Company, 524 F.2d 1317 (2d Cir. 1975)." Hotchner v. Castillo-Puche, 404 F.Supp. 1041, at p. 1050 (S.D.N.Y. 1975).

- ii. The refusal to permit adequate discovery forecloses summary judgment

In those relatively infrequent defamation and privacy cases where summary judgment is granted, the "drastic remedy" is usually employed only after extensive and complete discovery. See, e.g. Guitar v. Westinghouse Elec. Corp., 396 F.Supp. 1042 1057 (S.D.N.Y. 1975).

This is so because the circumstantial facts from which a defamation plaintiff may prove "malice" or "negligence" are generally within the sole possession of the publisher.<sup>94</sup> See

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<sup>93</sup> Avoidance of the so-called "chilling effect" was one of the major grounds relied upon by Judge Tyler in granting summary judgment for Nizer and Doubleday. Apparently, however, the effect of the litigation was not sufficiently chilling to deter Fawcett from its defamatory re-publication.

<sup>94</sup> For example, only he will know what sources were checked or what other precautions were or were not taken to insure the accuracy of the material he publishes.



Buckley v. Vidal, 50 F.R.D. 271 (S.D.N.Y. 1971).<sup>95</sup>

In entertaining a defamation plaintiffs' motion to compel discovery, District Judge Haight recently considered what he deemed,

"in substantial part [a question] of first impression -- that is, what are the appropriate bounds of discovery in a defamation action where the plaintiff is alleged to be a public figure?" Herbert v. Land, 74 Civ. 434-CSH (S.D.N.Y. January 4, 1977).

In his lengthy, thorough and well-reasoned opinion (which we commend to this Court) he concluded that

"a 'public figure' plaintiff in a defamation action is entitled to liberal interpretation of the rules concerning pre-trial discovery." <sup>96</sup> Id. at p.12

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<sup>95</sup> In ordering the production of numerous requested documents, Judge Levet stated:

"In the case at bar, it seems that plaintiff is obligated to delve into the realm of defendant's conduct, motivation and belief in order to recover, at least with regard to statements directed to public conduct of the plaintiff. Although in recent years the Supreme Court has placed stringent burden of proof requirements on a public official or public figure suing for defamation, such plaintiffs may still recover if they sustain their heavy burdens. As long as a cause of action for defamation passes constitutional muster, a plaintiff must be allowed reasonable opportunity for discovery. Defendant's objection to production and inspection on broad First Amendment grounds is therefore overruled." 50 F.R.D. at 273-4

<sup>96</sup> He also interpreted this to mean that there must be liberal discovery even into areas or material which would not constitute admissible evidence at trial. Id. See Rule 25(b) (1) F.R.C.P., 4 Moore's Federal Practice (2d ed. 1976) ¶26.56 [5] at pp. 26-179.

Judge Haight permitted inquiry into the author's

"... conclusions, opinions and intentions, formulated during the period of time that he was researching and preparing [the work] with particular reference to people or leads to be pursued or not pursued, the veracity of persons interviews or excluded." Id. p. 13.

He found such inquiry entirely relevant

"where the defendant's state of mind is of central importance to a proper resolution of the merits."

He found further that the plaintiff was

"equally entitled to discovery on whether [the author's] investigation and research was negligent." Id. p. 15.

These are precisely the areas of inquiry which plaintiffs sought to pursue in the instant case. The results of such discovery were equally crucial to their case, and counsel vigorously attempted to obtain the requisite and otherwise unavailable information through such discovery.

The District Judge below precluded any discovery on Count II whatsoever, putting plaintiffs in a total Catch-22 situation. On the one hand, they were entirely precluded from obtaining facts within the defendants' possession which were necessary to make a showing of malice or negligence; on the other, summary judgment was granted because they did not make such a showing.

The district court's denial of discovery was clearly erroneous, Buckley v. Vidal, Herbert v. Lando, supra; its resulting grant of the motion for summary judgment was equally so, and must be reversed.



### POINT III

#### THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFF'S CAUSE OF ACTION FOR INVASION OF PRIVACY

In purportedly describing the plaintiff's last visit with their parents at the death house, Nizer wrote, in part:

"Ethel felt Michael shivering next to her. He had not followed the talk. His mind was filled with vivid images created by 'orators' who aroused audiences by morbid descriptions of his father and mother writhing against the straps of the electric chair. The family that was housing him reported that time and again, they were awakened by his shrill nightmare screams.

"When, despite the manacles, the petition was signed Bloch tried to harness the rampant emotions he felt everyone but Robby was experiencing. As lightly as he could, though the quiver in his voice betrayed him, he said, 'Well, I must rush off to catch the plane back, and get the good news. Come, boys, say good-bye.'

"He embraced Ethel. She clutched him and he felt this was her final expression of gratitude. He turned away without looking at her, to shake hands with Julius, who drew him toward him and put his head against his chest. Robby kissed both and ran to the door, but when Michael put his arms around Ethel, he began to shake with suppressed sobs. The matron, in tears herself, gently separated them, and led him to his father. He covered his father's face with kisses, mumbling incoherently. The matron pulled him away and with her arm around him tried to lead him out. Suddenly, he broke out of her grasp, and began to scream hysterically.

"'I'll never see you again! They're going to kill you! I won't let them! I'll kill them first. They are murderers! I won't let them kill my mother and father!'

"He ran to Ethel and threw his arms around her. His face was contorted. The guard seized him,

lifted him bodily, and carried him out kicking wildly. Ethel tried to run to him, but the matron held her down. Robby dashed at the guard, pounding his fists at him. Bloch, weakened by his exertions, could not absorb another blow. He tottered, holding the door to steady himself, as the wals in the room finally ushered him out.

"Julius sat frozen and choked. He lifted his chained arms high above his head, tears flooding down his cheeks, and then there came from him an animalistic, unending bellow--'No-o-o!' " The Implosion Conspiracy, pp. 435-36.

The plaintiffs pleaded that, by writings such as that above, defendants wrongfully invaded their right of privacy. The district court disagreed, holding, as a matter of law, that:

- (1) the right of privacy does not apply to matters properly within the "orbit of public interest and scrutiny" which are constitutionally protected; and
- (2) The New York statute does not permit recovery where the plaintiff's "names" were not used; and
- (3) The New York right to privacy statute does not apply to historical accounts of newsworthy events.

Obviously, each of these "matter of law" rulings in turn depends upon factual determinations, and consistent with plaintiffs' general position on this appeal, they argue that the district court simply did not have all the necessary evidence to make those rulings.

Additionally, however, they believe that the district court's ruling were incorrect as a matter of law, and that the court misunderstood and misconstrued both the issues of action-



ability and privilege<sup>97</sup> which form the rationale for its opinion. Plaintiffs believe that a careful analysis of the cases and applicable statute will serve to demonstrate the district court's error in granting summary judgment, and will clarify their right to recover in this case.

#### Invasion of the Right of Privacy

In any suit for the invasion of privacy, the Court must determine, sequentially, three district questions.

First, the Court must determine whether the plaintiffs' privacy was invaded, with reference to generally recognized standards concerning the right of privacy.

Second, the Court must determine whether, under the applicable laws of the appropriate jurisdiction or jurisdictions, the invasion of privacy was "actionable".

If the invasion is actionable the Court must third determine whether the otherwise actionable invasion is "privileged" so as to foreclose recovery.

The facts of the instant case and the case and statutory law of the relevant jurisdiction will be considered in answering these three questions seriatim.

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<sup>97</sup> We take it that (1) above goes to privilege, (2) and (3) to actionability.

A. Was the Plaintiffs' Privacy Invaded?

Under the Restatement of Torts, the right of privacy is invaded when there is

- "(a) Intrusion upon the seclusion of another, as stated in §652B; or
- "(b) Appropriation of the other's name or likeness, as stated in §652C; or
- "(c) Publicity given to the other's private life, as stated in §652D; or
- "(d) Publicity which places the other in a false light before the public, as stated in §652E." ALI, Restatement of Torts, Section §652A(2) Tent. Draft No. 21 (1975)

Or, as the New York Court of Appeals has stated:

"The very nature of the tort is the publication and exploration of a person's private life and activities in such a manner as to cause him embarrassment and mental suffering. Since such injury may result even if the material published is entirely accurate it follows that truth is irrelevant to a charge of invasion of privacy ... [the law] implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all." Shiles v. News Syndicate Co., 27 N.Y.2d 19, 313 N.Y.S.2d 104 at 111 (1970).

The plaintiffs pleaded that the defendants' depiction of their relationship with their parents and of certain private and personal events in their lives, or to which they were purportedly parties did, in fact, invade their private lives and, additionally, placed them in a false light.<sup>98</sup> (See complaint,

<sup>98</sup> Under the Restatement definition or the common law tort, of course, these are two entirely separate "wrongs".



¶¶25-28 [11-12], supplemental complaint, ¶¶35-37 [69-71] ).

See Point II(B) supra for discussion of the protected private areas of public figures lives.

Any consideration of the material complained of, including the excerpt from Mr. Nizer's "re-creation" of plaintiffs' final death-house visit to their parents<sup>99</sup> set forth above, inescapably compels the conclusion that the book the Implosion Conspiracy invades the privacy of the plaintiffs within all applicable standards of law.

B. Is the Invasion of Privacy Actionable  
Under New York or Other Law?

A threshold question here is what law is applicable in this diversity action between Massachusetts plaintiffs and New York and Connecticut defendants. See, e.g. Varnish v. Best Medium Publishing Co, 405 F.2d 608, 610-11 (2nd Cir. 1968), Garner v. Triangle Publications, 97 F.Supp. 546, 548-49 (S.D.N.Y. 1951)

While the District court apparently never considered this question, it apparently believed that, at least as to

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<sup>99</sup> The "death house visit" is but one example of defendant Nizer's complete disregard for the privacy of most intimate moments. Any child's farewell to a dying parent or parents is the most personal kind of event which no decent person would wish to see broadcast to the world at large.

Nizer and Doubleday, New York's privacy law applied.<sup>100</sup> It never considered, in the rather complicated procedural context in which the claim arose,<sup>101</sup> what law was applicable to the claim against Fawcett whether the multi-state multiple publications by all defendants made the privacy laws of all states applicable.<sup>102</sup>

If the decision in this case will indeed be deemed<sup>103</sup> dispositive in the Connecticut action, it would be unfair and

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<sup>100</sup> The parties primarily briefed New York law, although there is some question as to whether, under its own choice of law rules, a court of the forum state, *e.g.*, New York Klaxon Co. v. Stentor Elect. Mfg. Co., 313 U.S. 487 (1941) would have applied its own law or that of the plaintiffs' domicile (See Babcock v. Jackson, 12 N.Y.2d 473, 481, 240 N.Y.S.2d 743, 749 (1963) applying the "most significant contacts" rule). It appears that Massachusetts would recognize a claim for "false light" invasion, see Brauer v. Globe Newspaper Corp., 217 N.Ed. 736, 351 Mass. 53 (1966); DeSalvo v. Twentieth Century Fox Film Corp., 300 F.Supp. 742 (D. Mass. 1969) and actionability under the common law standard will be discussed *infra* at in connection with Connecticut's right to privacy.

<sup>101</sup> In permitting Fawcett to intervene in the New York action, staying the Connecticut action, and holding that Fawcett and the New York defendants were "in privity," this Court at least suggested that "adjudication of the issues in the New York action" would be dispositive of the issues in the Connecticut case." Meeropol v. Nizer, *supra*, 505 F.2d at 236. In so doing, it obviously ignored or forgot the fact that a District Court sitting in Connecticut was hardly likely to apply substantive New York privacy law in an action by Massachusetts plaintiffs agent against Connecticut defendants.

<sup>102</sup> See, *e.g.* Judge Kaufman's opinion in Garner v. Triangle Publications, *supra*, holding "the defendants' magazines are sold over the nations, and therefore the privacy laws of all states are in question" 97 F.Supp. at p. 548

<sup>103</sup> Whether under the rubric of res judicata, collateral estoppel, or "law of the case."



unreasonable to deprive plaintiffs of the benefit of Connecticut law, and, therefore, the substance and applicability<sup>104</sup> of that law will also be discussed.

a) New York Law

New York's actionable right of privacy is set forth at<sup>105</sup> Sections 50 and 51 of its Civil Rights Law, and appears, at first glance, to be limited to the second, or §652C "appropriation"<sup>106</sup> ground set forth in the Restatement. In fact, however, Section 51 has been read to create what is in essence a §652E "false light" cause of action, see, e.g. Greenawalt, New York's Right of Privacy - The Need for Change, 42 Brooklyn L. Rev. 159, 183 (1975) and a simple §652 "publicizing private life" cause of action, id.

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<sup>104</sup> A District Court sitting in Connecticut, applying Connecticut's choice of law rules, would apparently through rather redundantly look to Massachusetts's choice of law rules to determine the applicable substantive law. See, e.g. Fouts v. Fawcett Publications, 116 F.Supp. 535 (D. Conn. 1953); Hazlett v. Fawcett Publications, 116 F.Supp. 538 (D. Conn. 1953). Where the law of the state of plaintiff's domicile is unclear or non-existent, the Connecticut court will apply its own law. Fouts, supra. Thus, if the Connecticut court had any doubts about the existence of common law right of privacy in Massachusetts, it would undoubtedly apply its own substantive law - with the common law tort - to the case.

<sup>105</sup> The statute is set forth in Judge Tyler's opinion at (203-204)

<sup>106</sup> The seminal New York case, Roberson v. Rochester Folding Box Co., 191 N.Y. 538 (1902) involved defendants' use of plaintiff's picture and likeness to advertise its flour. The New York statute was enacted in response to this decision. See, Note 42, Brooklyn L. Rev. 527, 528 fn. 13 (1976)

The New York Court of Appeals has accomplished this apparent broadening by holding that significantly false statements are "for purposes of trade" even if true statements from the same source would not be. See, e.g. Spahn v. Julian Messner, Inc., 18 N.Y.3d 324, 274 N.Y.S.2d 877 (1966) vacated 387 U.S. 239 (1967), amended 20 N.Y.S.2d 752, 283 N.Y.S.2d 119, aff'd 21 N.Y.2d 124, 286 N.Y.2d 832 (1967) app. dismissed, 393 U.S. 1046 (1968). In other words, once an event is substantially fictionalized, the publisher's motive is deemed to be "commercial" rather than the pure, non-actionable dissemination of information.

Thus, for example, where a television program dramatized an actual historical event, but a portion of the dialogue was

"... inaccurate and fictionalized to dramatize and to 'sexualize' the play ...".

The publication will be deemed "for purposes of trade"<sup>107</sup> and

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<sup>107</sup> In that case, dealing with the assassination of Rasputin, the plaintiff, who had actually been involved also claimed that the television program

"did not accurately depict [his] motivation and his inter-relationship with Princess Irina in the events leading to RASPUTIN's death and that it was a fictionalization of true events." Id at p. 759.



recovery may be had under the statute. Youssouppoff v. Columbia Broadcasting System, Inc., 48 Misc.2d 700, 265 N.Y.S.2d 754, 759 (S.Ct. N.Y. Co. 1965).<sup>108</sup> See also Garner v. Triangle Publications, 97 F. Supp. 546, 549 (S.D.N.Y. 1951).<sup>109</sup>

These cases demonstrate conclusively that the fictionalization of historical events practiced by the defendant Nizer would clearly be deemed actionable under the New York statute, and that Judge Tyler's holding to the contrary was wrong as a matter of law.

The New York Courts have also considered the publica-

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108 The claim in Youssouppoff was remarkably similar to that made in the instant case, and the same result, namely, denial of a motion for summary judgment, should occur.

109 Judge Kaufman, then a District Court Judge, wrote:

"the right to invade a person's privacy to disseminate public information does not extend to a fictional or novelized representation of a person, no matter how public a figure he or she may be. Koussevitsky v. Allen, Towne & Health, Inc., 188 Misc. 479, 68 N.Y.S.2d 779, affirmed 1947, 272 App. Div. 759, 69 N.Y.S.2d 432; Binns v. Vitagraph Co. of America, 1913, 210 N.Y. 51, 103 N.E. 1108, L.R.A. 1915c, 839; cf. Mau v. Rio Grande Oil, Inc., D.C.N.D. Ca. 1939, 28 F. Supp. 845." Garner, id. at p. 549

tion of non-fictionalized, but otherwise private material "for purposes of trade" when the material was not necessary to convey information of legitimate public interest. Martin v. New York Metropolitan Fiction, 139 Misc. 290, 248 N.Y.S. 359 (S. Ct. Rensselaer Co.) aff'd 234 App. Div. 904, 254 N.Y.S.1015 (3rd Dept. 1931).

In that case, defendants published an article about a murder trial in which the plaintiff's daughter was the victim. Included in the article was a photograph of the plaintiff as she attended the trial. The caption of the photograph stated:

"Blossom Martin's sister and mother seated in court by Assistant District Attorney McDonald. As [the alleged murdered] passed close by, on his way to the witness stand, the broken hearted mother cried out: 'I could kill that man with my own hands!'" Id. 248 N.Y.S. at p. 360.

In holding the publication "for purposes of trade" and thus actionable under the statute the New York Court wrote:

"The history of the crime does not involve the plaintiff here in any way, nor, so far as the article indicates, did she take any part in its detection or in the trial of the accused. Her existence is without significance in connection with the events recorded. From the standpoint of the reader of the magazine, the conclusion would be, ordinarily, that the picture of plaintiff with its accompanying lurid and passionate quotation attributed to her was inserted simply to add to the attractiveness and sale of the publication. Such a use I do not believe to be legitimate, but rather a commercial one." Id. 248 N.Y.S. at 362.



Thus in addition to fictionalization, the fact that virtually all of the material relating to plaintiffs was entirely unnecessary to the legitimate (as opposed to "lurid") public interest in the Rosenberg case further compels the conclusion that defendants' publications are actionable under New York law.

(b) The Plaintiffs' "Names" Were Used  
Within the Meaning of New York Statute.

The district court also apparently found that the defendants' invasion of plaintiffs' privacy was not actionable under the New York statute because their "names"<sup>110</sup> were not used. Both common sense and well developed case law compel the conclusion that this entirely novel interpretation of the statute is erroneous.

While the precise question of persons who have had two names has never been before the New York courts, it is impossible to believe that they would not accord relief for an otherwise actionable invasion of privacy of, say, the childhood of Cassius Clay, brought by a plaintiff named Muhammed Ali. Nor, given the protection accorded sports figure's early lives, would a fictionalized biography of Lew Alcindor be found outside the statute if a lawsuit were instituted by Kareem Abdul Jabar. In both in-

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110 The statute actually applies to "name, portrait or picture". It should be noted that the plaintiffs' "pictures" also appear twice in Nizer's book. Implosion Conspiracy, photos numbered 16 and 21 following p. 352.

stances, the hypothetical plaintiffs have had two names,<sup>111</sup> but the point is that both are their names<sup>112</sup> -- and are recognizable by either the public, or limited groups of the public,<sup>113</sup> as such.

Denying recovery to persons with two names entirely contravenes the statute's intent and application in protecting from exploitation the privacy of a recognizable person. The New York courts have repeatedly interpreted the statute as requiring that the plaintiff be "recognizable". See Doe v. Roe,<sup>114</sup> supra, Negri v. Schering Corporation, 333 F.Supp. 101

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111 Persons may have two names for a variety of reasons, including the taking of stage names (Norman Jean Baker to Marilyn Monroe) or changes based on religious grounds, as in these hypotheticals. This Circuit has specifically held that so called "stage names" are protected under the statute. Gardella v. Log Cabin Products Co., 89 F.2d 891, 894 (2d Cir. 1937).

112 Another obvious example is the "second" name customarily taken by a woman upon marriage. Although she may be known by her husband's name, she never entirely "loses" her own, maiden name. See, e.g. N.Y.Dom. Rel. L. §240-a (Supp. 1976) (right to resume maiden name on divorce).

113 The entire world need not recognize a person's name or picture to make it actionable. See Doe v. Roe, supra, Brauer v. Globe Newspaper Corp., supra.

114 In the book at issue in Doe v. Roe, the plaintiff's name was not used, and some attempt was made to disguise her identity, but the "record of her psychotherapeutic treatment" was "near verbatim" presumably allowing her to be "recognized" by some members of the public, or at least creating an issue of fact on recognizability to be determined at trial.



(S.D.N.Y. 1971)<sup>115</sup> Cf. Toscani v. Hersey, 271 App. Div. 445,  
65 N.Y.S.2d 814 (1st Dept. 1946).<sup>116</sup>

The plaintiffs, Michael and Robert Meeropol also are and were Michael and Robert Rosenberg. To some, if not all of the public, they are identifiable as both. Both Rosenberg and Meeropol are their "names" and an otherwise actionable invasion of privacy would clearly be cognizable in New York regardless of which name was used.

(c) Connecticut Law.

Like most states in this country, see, e.g. Prosser,

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115 In Negri, defendants used a forty year old picture of the plaintiff. The Court wrote

"No doubt, Miss Negri's appearance at this writing differs substantially from what she looked like in 1922 when the picture was taken. But this, again, is beside the point. The policy underlying the New York statute is to protect 'any living person' against the unauthorized use of his or her name or picture for commercial exploitation. If a picture so used is a clear and identifiable likeness of a living person, he or she is entitled to recover damages suffered by reason of such use, whether or not his or her appearance has altered through the passage of time. See, e.g. Hayden v. Bristol Myers Co., supra; cf. Fleischer v. WPIX, Inc., 30 Misc. 2d 17, 213 N.Y.S.2d 632 (Sup. Ct. 1961); Gautier v. Pro-Football, Inc., 304 N.Y. 354, 197 N.E.2d 485 (1951); Jackson v. Consumer Publications, 169 Misc. 1022, 10 N.Y.S.2d 691, aff'd 256 A.D. 965, 10 N.Y.S.2d 634 (1939)." Id. at 105.

116 That case, relied upon by the district court (197) implies precisely the opposite. It was because whether the events of the plaintiffs' life were or were not used, the account, including changes of locations and entirely falsified names, was so fictionalized that he could not be identified, 65 N.Y.S.2d id. at 816-17.

supra, §117, at p. 804, fn. 16, Connecticut recognizes the common law tort of invasion of privacy, e.g. Korn v. Rennison, 21 Conn. Sup. 400, 156 A.2d 476 (1959); Travers v. Paton, 261 F.Supp. 110, 114 (D. Conn. 1966)<sup>117</sup>. In the absence of a large number of Connecticut cases setting forth the parameters of the right, Connecticut courts have looked to cases from other jurisdictions which also recognize that common law right<sup>118</sup> as well as the generally recognized authorities such as Prosser.

Under the less restrictive common law cause of action, requiring neither publication of "name, portrait or picture" nor publication "for purposes of trade" the plaintiffs clearly have an actionable injury. See, e.g. Prosser, supra, §117, Varnish v. Best Medium Publishing Co., 405 F.2d 608, 611 (2d Cir. 1968) (applying similar Penna. common law right of privacy).

A district court sitting in Connecticut would, whether

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117 The district court in Connecticut thought the common law right of action recognized by Connecticut, was much broader than New York's statutory right. Id. at p. 114 and fn. 11 therein.

118 See, for example, the several citations to compilations of cases from other states in A.L.R. and A.L.R.2d contained in Carey v. Statewide Finance Co., 3 Conn. Cir. 716, 223 A.2d 405 (1966) at pp. 406, and citations to decisions in other common law states. See Steding v. Battistoni, 3 Conn.Cir. 76, 208 A.2d 559, 561 (1964); Korn, supra, at p.478.



applying substantive Connecticut law or construing Massachusetts law,<sup>119</sup> find that, in the absence of privilege, plaintiffs have sustained a tortious injury for which they could recover against the defendant Fawcett.

C. Was the Defendant's Otherwise Actionable  
Material "Privileged" So as to Deny Recovery.

As in the realm of defamation, it is clear that otherwise actionable material may, under some circumstances, be deemed "privileged" under the First Amendment, Time, Inc. v. Hill, 385 U.S. 374 (1967) so as either to deny recovery, or to premise recovery on a far stronger showing of fault than would otherwise be necessary.

Ignoring for a moment the present viability of Hill itself (see p.108, *infra*), the cases in general, and New York cases in particular<sup>120</sup> can be divided into four fact patterns from

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<sup>119</sup> See Fouts v. Fawcett, *supra*, where the court indicated that if the law were unclear or unsettled in the state of the plaintiff's domicile, it would assume the highest court in the domicile state would apply the generally recognized law -- in this case, presumably, the common law tort also recognized by Conn. Plaintiffs have already argued, however, that Massachusetts would or does recognize this cause of action.

<sup>120</sup> It does not appear that, in the area of privilege (which, after all, is governed by federal constitutional standards) the New York law or cases are any different from federal or other state law. The reason for occasional conceptual difficulty is that the same operative facts which go to privilege (i.e. the public-ness of a person or event, or the truth of a publication) also, under the somewhat more restrictive New York law, may go to the earlier question of actionability. See (2) above.

which, in turn, the legal conclusion as to applicability of privilege may be drawn. These four fact patterns are as follows:

a. Private Person/Private Event. Obviously, under the rationale of Hill itself, and any of a host of other cases, the public has no "legitimate interest" here sufficient to create a privilege for the invasion of an individual's privacy whether or not the publication is true, e.g., Shiles v. News Syndicate Co., supra.

b. Public Person/Private Event. The law is clear that, at the very least, when a public person's privacy is invaded, that invasion is privileged only if the publication consists solely of the "plain; unvarnished truth." Sidis v. F-R Publishing Corp., 113 F.2d 806, 807 (2d Cir.), cert. den. 311 U.S. 711 (1940). Where, however, there is a "fictionalization" of the private event, the privilege will not apply to prevent recovery. See, e.g., Spahn v. Julian Messner, supra. And, no matter how public the person, there may be events so private that even truthful publication will not be protected. See Cox Broadcasting Co. v. Cohen, 420 U.S. 469, 491 (1975); Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), cert. den. 425 U.S. \_\_\_\_ (1976); Prosser, §118, at pp. 825-26; Note, 29 Vanderbilt L. Rev. 870 (1976).

c. Private Person/Public Event. In this, the most problematic fact pattern, if Hill is still good law, a privilege will apply so as to require a showing of malice before recovery



may be obtained. See, e.g., Varnish v. Best Medium Publishing Co., supra, 405 F.2d at 611.

If, however, as plaintiffs believe and Justice Powell has stated, the Gertz decision "calls into question the conceptual basis of Time, Inc. v. Hill," Cox Broadcasting Co. v. Cohen, supra,<sup>121</sup> either the privilege does not apply or, at the very least, plaintiffs need not prove malice to recover.

d. Public Person/Public Event. If the plaintiff is truly a public figure, and the events portrayed are of public interest, recovery cannot be had without a showing of falsehood and/or malice.<sup>122</sup> E.g., Koussevitsky v. Allen, Towne & Heath, Inc., supra.

D. The Plaintiffs Should Recover And/Or Summary Judgment Was Inappropriate

In applying the tests of these cases to the instant case, it is clear that, at best, privilege does not bar recovery because plaintiffs are private persons, because the material which invades their privacy is clearly "fictionalized" and, as

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<sup>121</sup> The commentators have generally taken this position. See, e.g., Robertson, supra; Eaton, supra, 61 Va. L. Rev. at p. 1394; Phillips, Defamation, Invasion of Privacy and Constitutional Standard of Care, 16 Santa Clara L. Rev. 77, 99, 101-102 (1975); Greenawalt, supra, at pp. 184-185.

<sup>122</sup> The defendant's admission that the work is fictitious will apparently satisfy the malice test in New York as, indeed, conceptually it must. See, e.g., Spahn v. Julian Messner, supra, at p. 329-30; Youssoupoff v. Columbia Broadcasting System, Inc., supra, at 758.

plaintiffs strongly urge, the incidents reported are so private in nature that neither their status nor the truthfulness or non-truthfulness of the reports will accord them protection.

At worst, it is clear that the fact questions as to the plaintiffs' public figure status, and/or whether fictionalization was employed in various accounts in The Implosion Conspiracy, cannot be determined on the basis of the present record.

In a case where remarkably similar arguments were made in the pleadings as to whether material was a "factual" and therefore "privileged dissemination" or a fictionalized and sensationalized account, Judge Kaufman wrote:

"The Court believes, therefore, that the status or character of the articles themselves as fiction or fact, irrespective of whether mere untruths appear in the articles or whether they appear in magazines containing fiction stories as in the Sidis case, presents complicated questions of controversial facts which cannot be decided on a motion for summary judgment, but must await the trial." Garner v. Triangle, supra, at p. 549.

#### CONCLUSION

For all the reasons stated above, the judgment of the district court granting summary judgment should be reversed on all counts.

Dated: New York, New York  
February 1, 1977

Of Counsel:  
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Respectfully submitted,

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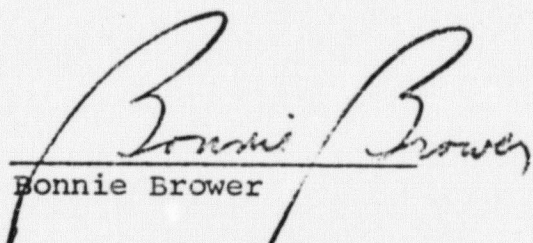
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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served a copy of the affixed brief upon Satterlee & Stephens, Esqs., Attorneys for Appellees Doubleday & Co., Inc. and Fawcett Publications, Inc., 277 Park Avenue, New York, New York 10022, and upon Phillips, Nizer, Benjamin, Krim & Ballon, Esqs., Attorneys for Appellee Louis Nizer, 40 West 57th Street, New York, New York 10019, by mailing at a United States Post Office a copy of the same to their offices.

Dated: New York, New York  
February 15, 1977

  
Bonnie Brower

